EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

766

No. 2159.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Los Angeles Gas & Electric Corporation, a corporation,
Plaintiff in Error,
vs.
The Western Gas Construction Company, a corporation,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

WM. A. CHENEY,
645 S. Hill St., Los Angeles, Cal.
HERBERT J. GOUDGE,
307 Exchange Bldg., Los Angeles, Cal.
LEROY M. EDWARDS,
600 H. W. Hellman Bldg., Los Angeles, Cal.
Attorneys for Plaintiff in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

Records of U.S. Circuit Court
of appeals
766

INDEX.

No. 2159.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Los Angeles Gas & Electric Corporation, a corporation,
Plaintiff in Error,
vs.
The Western Gas Construction Company, a corporation,
Defendant in Error.

Brief on Behalf of the Los Angeles Gas & Electric Corporation, Plaintiff in Error.

STATEMENT OF THE CASE.

In the month of April, 1907, the Western Gas Construction Company proposed to manufacture and install for the Los Angeles Gas and Electric Company at its plant in Los Angeles, California, an apparatus called an Extended Carburetter Superheater Water Gas apparatus to be used for the production of gas from lampblack. The proposal was in writing [Tr. p. 9] and it contained certain guaranties as to the capacity and economies of operation of the apparatus proposed to be

furnished. In reliance upon those guaranties the gas and electric company entered into a written contract with the construction company for the purchase of the apparatus [Tr. pp. 11 *et seq.*] at the price of $35,694, payable fifty per cent. when the material was shipped, twenty-five per cent. during the progress of the work, and the balance thirty-five days after acceptance of the apparatus. The construction company manufactured the parts of the apparatus at its plant in Fort Wayne, Indiana, shipped them to Los Angeles, and delivered and assembled them at the plant of the gas and electric company there. At the time of shipment of the parts and during the construction of the apparatus the gas company paid to the construction company, under the provisions of the contract concerning the manner of payment of the contract price, the sum of $26,823.45. After the completion of the apparatus a controversy arose between the construction company and the gas company as to whether the apparatus fulfilled the guaranties of efficiency and economy made in the construction company's proposal; and the gas company refused to accept the apparatus or to pay the balance of the purchase price, but offered to permit the construction company to remove the apparatus upon the repayment of the purchase money already paid, and also demanded such repayment. Upon the refusal of the construction company to repay any of the money paid to it, the gas company brought an action in July, 1908, against the construction company, in the United States Circuit Court to recover the money so paid and for damages for breach of contract. A year later, and after the de-

fendant had appeared in that action, negotiations between the parties were undertaken with a view to settle the controversy without further litigation, and on the 12th of July, 1909, with the express intent of settling and disposing of all controversy and litigation, the gas company and the construction company entered into a new contract at Los Angeles. [Tr. pp. 39 *et seq.*] In this contract, after reciting the making of the former contract of April, 1907, the installation of the apparatus, the payment of a part of the purchase price, the arising of litigation on the question whether the apparatus was in accordance with the contract and could produce the amount of gas guaranteed, and the desire of the parties to dispose of the controversy, the construction company agreed to make such changes in the apparatus as it might desire, for the purposes of a "preliminary experiment" for the determination of the character of the changes and alterations desirable preparatory to a "final test." Some of the changes contemplated were set forth in the contract and it was agreed in the contract that, after these changes were made, the construction company should at once proceed to make gas with the apparatus of the kind specified in the contract of April, 1907, with the economy of fuel and oil mentioned in that contract, and it was further agreed in this new contract that if, in this final test, the construction company should bring the apparatus to a gas-making capacity of 2,000,000 cubic feet per day, with the specified economy of fuel and oil, then the construction company should accept $26,000 in full payment for the apparatus, and return the $823.45 over

and above that sum which had already been advanced to it under the former contract; that if the apparatus, during the test, was brought to a capacity of 2,750,000 cubic feet per day, then the construction company should be paid $35,674, the original contract price, and that proportionate amounts between these two limits should be paid according to the gas-making capacity of the apparatus between 2,000,000 and 2,750,000 cubic feet per day as shown in the final test; while if the apparatus could not, during the final test, be brought to a capacity of at least 2,000,000 cubic feet per day, then the construction company was to remove the apparatus and to refund the $26,823.45 advanced to it. The "final test" referred to is stated to be a test of twenty consecutive days, to commence when the construction company notified the gas company; and the capacity of the apparatus is declared to "the average capacity per twenty-four hours of said set during said test." [Tr. p. 43.]

After the execution of this new contract the action brought by the gas company upon the former contract was dismissed, and in August, 1909, the Los Angeles Gas & Electric Corporation, the plaintiff in error, became the successor and assignee of the Los Angeles Gas and Electric Company. For the sake of brevity the plaintiff in error will hereafter be referred to as the gas corporation, and the defendant in error, as heretofore, will be called the construction company. In July and August, 1909, the construction company operated the apparatus in a preliminary test and thereafter made such changes in the apparatus as it desired to make, and, as the findings show, a final test was commenced on

the 10th of March, 1910, [Tr. p. 777] and the apparatus was operated continuously for twenty days, that is, until the 30th of March (with the exception of three days, the 14th, 15th and 16th of March, during which the apparatus was shut down for repairs). During the operation of the apparatus from the 10th to 30th of March it failed to produce an average 2,000,000 cubic feet per 24 hours—the minimum capacity required by the contract—and the trial court so finds [Tr. p. 778]. Nor were the guaranties of economy of fuel consumption, or of quality of gas fulfilled. Under these circumstances the gas company refused to accept the apparatus and demanded its removal and the return of the money advanced. Upon the refusal of the construction company to comply with either of these demands, the present action was brought for the recovery of the money paid and for $1500.00 additional for the cost of removing the apparatus from the gas company's premises.

The defendant in its answer and cross-complaint, besides specifically denying practically all of the allegations of the complaint, set up the defense that the substance furnished to it by the gas corporation during the final test "was not lamp-black, but was only partly "lamp-black, and partly composed of other substances;" and that the substance furnished "as and for lamp-black "was not furnished in a scientific shape, nor in the usual "way, *nor according to the understanding between the "defendant and the Los Angeles Gas and Electric Com-"pany and the plaintiff.*" [Tr. p. 86.] The underscored portion of this quotation from the defendant's pleading sets forth the principal contention upon which the de-

fendant relied at the trial. It was upon the issue raised by this allegation that the trial court found against the plaintiff in error, and, as will be seen from the specifications of error relied upon, all the other material or determinative findings made by the court, which are adverse to the plaintiff in error, are dependent upon, and must stand or fall with the finding that the plaintiff did not during said final test, "furnish lamp-black fuel of the *quality* called for by said contract." [Finding XVI, Tr. p. 781.]

The particulars in which the trial court found that the material furnished by the gas corporation, from which gas was required to be manufactured by the apparatus installed by the construction company, was not of the quality called for by the contract, are set out in Finding XVI, in which the court finds that "the said "lamp-black fuel so furnished was the lamp-black "* * * material referred to in the contracts of the "parties, and was in brick form * * * and was in "compliance with the contract except as hereinafter set "forth" [Tr. p. 782]—namely, that the bricks of lamp-black were not of the hardness and tensile strength called for by the contract. The plaintiff in error contended that the contract did not call for, or prescribe, any particular form of lamp-black or degree or quality of solidity, hardness or tensile strength of bricks or lumps. The written contract in suit, which was made July 12, 1909, does not, as will be seen upon inspection [Tr. p. 39], contain any provision or agreement that the lamp-black from which the gas is to be made should be in any particular form, or have any particular quality

of hardness or solidity, but the trial court held that negotiations between the parties, *prior to the making of the contract of April,* 1907, showed an agreement or understanding, binding upon the gas company, that the lamp-black to be furnished under the new written contract of July 12, 1909, should be in bricks of a quality equal in hardness, substance and tensile strength to certain sample briquettes of lamp-black obtained from the gas company by the construction company prior to entering into the contract of April, 1907.

This modification of, and addition to the terms of a written contract by the findings of the court is the principal error relied upon by the plaintiff in error. The trial court also found that the apparatus installed by the construction company did not have "a capacity in excess of 2,000,000 cubic feet of gas per twenty-four hours of the kind of gas prescribed in the contract of July 12, 1909, and with the fuel economies therein specified." [Tr. p. 785.] The contract provided that if the apparatus was shown to have a capacity of not more than 2,000,000 cubic feet per day with the specified economy of fuel and oil, then the construction company should accept $26,000 in full payment for the apparatus and return the $823.45 over and above that sum which had already been advanced to it. [Tr. p. 41.] The trial court found from the evidence that the gas-making capacity of the apparatus did not exceed 2,000,000 cubic feet of gas per twenty-four hours, and yet failed to find that the gas company was entitled to the return of the sum of $823.45. As a conclusion of law from these two findings, and from the other findings which are logically

based upon them, the court below concluded that the plaintiff was entitled to take nothing against the defendant. The court also concluded that the defendant was entitled to take nothing against the plaintiff, notwithstanding that the failure of the apparatus installed by the construction company to produce the quantity of gas guaranteed was, according to the findings, "due to the fault of plaintiff" [Tr. p. 779] in not furnishing lamp-black of the quality described in the findings of the court.

From this decision and judgment the plaintiff in error sued out a writ of error, returnable before this Honorable Court.

STATEMENT OF THE ERRORS RELIED UPON.

The plaintiff in error asserts and relies upon the following errors assigned in the assignment of errors filed in the court below [Tr. p. 801]:

I.

Said Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, erred in giving, making, rendering, and entering judgment in the above-entitled case in favor of the defendant and against the plaintiff.

II.

The said court erred in failing to give, make, render, and enter judgment in the above-entitled cause in favor of the plaintiff and against the defendant in the sum of $28,323.45.

III.

The said court erred in making and filing the following portion of finding No. II, as follows:

"And said defendant was also informed by said Los Angeles Gas and Electric Company, through defendant's said agent, during such negotiations, that the fuel to be used in said proposed apparatus would be of like quality," to-wit, solid and substantially compressed (as the sample of briquette fuel furnished to the defendant's agent by the said Los Angeles Gas and Electric Company, prior to April 8th, 1907).

It appears from the evidence that the defendant was not, prior to the 8th day of April, 1907, or at any other time, informed by the Los Angeles Gas and Electric Company, through any of its agents or otherwise, that the fuel to be used in the said proposed water-gas apparatus of the Western Gas Construction Company would have a solidity or tensile strength equal to or greater than that possessed by the sample of briquette furnished to the defendant by the Los Angeles Gas and Electric Company prior to April 8th, 1907. On the contrary, the evidence shows that prior to the 8th day of April, 1907, the defendant was furnished by the Los Angeles Gas and Electric Company with a lamp-black briquet about two inches in diameter, and that the only representation made to the defendant prior to the entering into of the contract of April 8th, 1907, was that the lamp-black fuel which would be furnished to the defendant for the operation of the water-gas set under said contract would be lamp-black fuel having a chemical composition and quality equal to the chemical com-

position and quality of the lamp-black briquette furnished to the defendant, and that at the time of supplying the defendant with said lamp-black briquette, the said Los Angeles Gas and Electric Company specifically informed the defendant that the lamp-black fuel would not be furnished to the defendant in the size or form of the briquette, and neither stated to the defendant nor gave it any reason to expect or believe that the lamp-black fuel to be furnished to the defendant under said contract of April 8th, 1907, would possess a tensile strength or stability equal to or greater than that of said lamp-black briquette, furnished to it.

The evidence is insufficient to support the said finding in the respects mentioned.

IV.

The said court erred in making and filing the following portion of finding No. II, as follows:

That the Los Angeles Gas and Electric Company "would furnish said material in the form of bricks of about the size of ordinary building bricks, to-wit, about eight inches in length, about four inches in width and three inches in thickness, or in the form of briquets."

It appears from the evidence that on the 5th day of March, 1907, the Los Angeles Gas and Electric Company wrote a letter to the defendant, as follows:

"We are now negotiating for the purchase of a dryer to handle all of our brick, and anticipate that this dryer will turn out our carbon with from five per cent to not exceed ten per cent of moisture. After passing the dryer, the same will be bricked for use in the generators."

Other than the aforesaid statement, there was no agreement upon the part of the Los Angeles Gas and Electric Company that the said lamp-black fuel would be furnished to the defendant in the form of bricks.

The evidence is insufficient to support said finding in the respects mentioned.

V.

The said court erred in making and filing the following portion of finding No. II, as follows:

That the said Los Angeles Gas and Electric Company, prior to April 8th, 1907, informed the defendant that the lamp-black fuel which would be furnished to the defendant for the operation of its water-gas machine would be "of the same quality as the said samples so submitted."

It appears from the evidence that at no time did the Los Angeles Gas and Electric Company inform the defendant, or state to it, that the lamp-black fuel which would be furnished to it for the operation of its water-gas apparatus would have the tensile strength or stability or solidity equal to or greater than that of the lamp-black briquette sample supplied to the defendant by the said Los Angeles Gas and Electric Company. On the contrary, it appears from the evidence that the only representation or statement made by the Los Angeles Gas and Electric Company prior to April 8th, 1907, or at any other time, in comparing the fuel which would be furnished to defendant with the lamp-black sample which was furnished to it, was the statements by the Los Angeles Gas and Electric Company to the effect

that the chemical constituency of the lamp-black fuel to be furnished would be the same as that of the lamp-black briquette furnished; but no statement or representation was made as to the tensile strength or stability of the proposed fuel to be furnished to the defendant.

The evidence is insufficient to support the said finding in the respects mentioned.

VI.

The said court erred in making and filing the following portion of finding No. II, as follows:

"That similar information was also given the said defendant by the said Los Angeles Gas and Electric Company" (referring to information as to the quality of the lamp-black fuel which would be furnished as to stability) "in the form of correspondence which passed between them pending said negotiations."

It appears from the evidence that in none of the written correspondence passing between the Los Angeles Gas and Electric Company and the defendant was any mention made of what would be the character of the lamp-black fuel which would be furnished and supplied to the defendant during the operation and testing of its said apparatus as to tensile strength, or stability or solidity; but all of the written correspondence referring to said lamp-black was confined solely to the discussion of the chemical constituency of said lamp-black and to its moisture content.

The evidence is insufficient to support the said finding in the respects mentioned.

VII.

The court erred in making and filing the following portion of finding No. II, as follows:

"That all knowledge of the defendant with respect to the conditions at the plant of said Los Angeles Gas and Electric Company and of the character and quality of said fuel was obtained as above set forth."

It appears from the evidence that B. S. Pederson, agent of the said defendant, had for several years, prior to April, 1907, resided on the Pacific Coast, and was familiar with the by-product of oil-gas manufacture, known as lamp-black; and from the written correspondence introduced in evidence which passed between the parties to the contract, it is shown that the defendant company, through its agent, Mr. Pederson, obtained information as to the gas-making qualities and character of lamp-black, as a by-product of oil-gas manufacture, from sources other than the information received from the agents of the Los Angeles Gas and Electric Company, and from the briquette samples supplied by the said Los Angeles Gas and Electric Company to the defendant. And the evidence shows that before the defendant was willing to enter into the contract of April 8th, 1907, it received from and acted upon information from Mr. Pederson as to his own opinion and knowledge of the character and value of lamp-black as a fuel for water-gas manufacture.

The evidence is insufficient to support said finding in the respect mentioned.

VIII.

The court erred in making and filing the following portion of finding No. II, as follows:

"Defendant relied thereon" (information received from the Los Angeles Gas and Electric Company, and the samples of lamp-black briquettes furnished by said company to defendant) "and entered into the said contract in reliance upon the information thus obtained, and as above set forth."

It appears from the evidence that the defendant entered into the contract of April 8th, 1907, relying only partially upon the information obtained by its agents from the Los Angeles Gas and Electric Company. The evidence further shows that before the defendant company would consent to enter into the contract of April 8th, 1907, it desired to obtain, and did obtain, from its agent, B. S. Pederson, a vast amount of information which he had gained through his experience as their representative of the Pacific Coast from sources other than that of the Los Angeles Gas and Electric Company.

The evidence is insufficient to support the said finding in the respects mentioned.

IX.

The court erred in making and filing the following portion of finding No. IV as follows:

That subsequent to April 8th, 1907, and prior to July 12th, 1909, "said defendant claimed that the said apparatus was completed in accordance with said contract."

It appears from the evidence that at no time between the 8th day of April, 1907, and July 12th, 1909, did the defendant claim or assert in writing or orally to the Los Angeles Gas and Electric Company, or to any other person, that the said apparatus was completed in accordance with said contract. To the contrary, the evidence shows that at no time prior to the said 12th day of July, 1909, did the said apparatus ever produce as much as 2,000,000 cubic feet of gas per 24 hours, and that the balance of the purchase price payable within 35 days after the completion of the said apparatus, was never requested of the Los Angeles Gas and Electric Company by the defendant.

The evidence is insufficient to support the said finding in the respect mentioned.

X.

The court erred in making and filing the following portion of finding No. IV as follows:

"It has at all times been claimed by the defendant herein that said company" (Los Angeles Gas and Electric Company) "did not fully or at all perform said contract in some of the substantial particulars thereof."

It appears from the evidence that at no time prior to the 12th day of July, 1909, did the defendant complain, or even claim or assert that the said Los Angeles Gas and Electric Company had, in any respect or at any time, failed to perform all the conditions and obligations upon its part to be performed under said contract of April 8th, 1907. On the contrary, the evidence shows that the said apparatus of the defendant had, at all

times prior to the said 12th day of July, 1909, failed without any fault on the part of the Los Angeles Gas and Electric Company, to attain any of the fuel economies or the capacity to produce even 2,000,000 cubic feet of gas per day of 24 hours, as provided for in said contract of April 8th, 1907; and that the said defendant did not, at any time, attribute the said failure of the said apparatus to any act or fault upon the part of the Los Angeles Gas and Electric Company, to perform its obligations under said contract of April 8th, 1907.

The evidence is insufficient to support the said finding in the respects mentioned.

XI.

The court erred in making and filing finding No. V, as follows:

"With respect to the issues raised by the allegations of the eighth paragraph of the complaint to the effect that after the installation and completion of the extended carburetter superheater water-gas apparatus, provided for in the said contract of April 8th, 1907, tests of the said apparatus were thereafter made and to the effect that said apparatus never operated fully or completely or successfully or in any way approached or fulfilled the guaranties contained in the said contract, in the particulars set forth in the said eighth paragraph of said complaint and the denials of the said allegations in the answer of the defendant herein, the court finds that a controversy arose between the said Los Angeles Gas and Electric Company and the defendant as to whether or not tests of the same were made, and

whether or not the said apparatus did comply with the said guaranties; and at the trial of this cause it was agreed on behalf of both parties to this suit that the issues raised by the said allegations were not material to this controversy, and no evidence was offered thereon."

It appears from the evidence that the plaintiff repeatedly throughout the trial of this case attempted and endeavored to show and prove that at all times prior to the 12th day of July, 1909, the defendant failed to bring its said water-gas apparatus to the operative efficiencies set forth in said contract of April 8th, 1907, and that the trial court refused at all times to receive said evidence in evidence upon the objection interposed by the defendant, and not by reason of any agreement upon the part of the plaintiff that said evidence was not material to this controversy.

The evidence is insufficient to support the finding in the respects mentioned.

XII.

The court erred in making and filing the following portion of finding No. XI, as follows:

The said apparatus of the defendant was "not in operation on the 14th, 15th and 16th days of March, 1910, except for an inconsiderable period on the 14th and 16th of March, 1910."

It appears from the evidence that the apparatus of the defendant was in operation continuously from the 10th to the 30th of March, 1910, inclusive. The evidence further shows that such time as was taken by the de-

fendant on the 14th, 15th and 16th of March, 1910, for the purpose of cleaning out the checker-work of said apparatus is, according to gas-making practice, deemed part of the operation of a water-gas apparatus, although during such time the machine was not actually producing gas.

The evidence is insufficient to support the finding in the respects mentioned.

XIII.

The court erred in making and filing the following portion of finding No. XI, as follows:

"It is not true that the defendant notified plaintiff that the test was ended at that time" March 30th, 1910, at 6 o'clock a. m.).

It appears from the evidence that the defendant did notify the plaintiff that it had concluded its test of the said water-gas apparatus on the 30th day of March, 1910, at 6 o'clock a. m. The evidence shows that prior to the commencement of said final test on the 10th day of March, 1910, that the defendant notified the plaintiff in writing on the 28th day of February, 1910, as shown by plaintiff's exhibit 16, that on the morning of March 10th, 1910, the defendant would "begin the final 20-day test of the water-gas apparatus now at your plant, as provided for in the contract between your company and the Western Gas Construction Company, dated July 12th, 1909"; that at 6 o'clock a. m. on said 10th day of March, 1910, the defendant did commence the final test and operation of said apparatus and continued the same for the next twenty days consecutively, and did, of its

own accord, on the 30th day of March, 1910, at 6 o'clock a. m., cease operation of said water-gas apparatus; that at said time the plaintiff did have on hand at said apparatus the necessary fuel, labor and other material to have enabled defendant to have continued the operation of said apparatus had it so desired; that on said 30th day of March, 1910, within a few hours after said 6 o'clock a. m. of said day, the representative of the defendant presented himself at the office of the said Los Angeles Gas and Electric Corporation, and stated that the said defendant had completed said final test of said apparatus.

The evidence is insufficient to support the finding in the respect mentioned.

XIV.

The court erred in making and filing the following portion of finding No. XI as follows:

"Defendant did, then and there" (March 30th, 1910), "offer to proceed with the test of the said apparatus for any reasonable number of days for the purpose of demonstrating the actual capacity of said apparatus."

It appears from the evidence that the defendant did not, on said March 30th, 1910, offer to proceed with the test of said apparatus for any reasonable number of days, for the purpose of demonstrating the actual capacity of said apparatus. On the contrary, the evidence shows that after ceasing the operation of said apparatus on the 30th day of March, 1910, the representative of the defendant stated to the plaintiff that the apparatus was in such a condition that the generator head had to be

reinforced by new I-beams, as the same was leaking, that the carburetor and superheater had to be entirely re-checkered and lined with bricks, and various other changes made before the operation of said apparatus could continue. And the evidence shows that the only representation made by the defendant of its willingness to continue the operation of said apparatus was an expression of their willingness to so continue if the plaintiff would allow the defendant time to make all of the said changes and repairs upon said apparatus, and that then the defendant would be glad to make another demonstration of the said apparatus; but no offer was made by the defendant to immediately continue the operation of said apparatus.

The evidence is insufficient to support the finding in the respects mentioned.

XV.

The court erred in making and filing the following portion of finding XI, as follows:

Defendant "offered to correct any defects in said apparatus which had resulted during the operation of the same."

It appears from the evidence that on the 30th day of March, 1910, the defendant offered to correct any defects which had resulted in said apparatus during its operation solely upon the condition and agreement upon the part of the plaintiff, that it would then and there accept the said apparatus, or that it would permit the defendant to commence to make another and additional test of said apparatus.

The evidence is insufficient to support the finding in the respects mentioned.

XVI.

The court erred in making and filing the following portion of finding No. XI, as follows:

The defendant at said time offered "to make another test thereof."

It appears from the evidence that the defendant did not, at said time, to-wit, March 30th, 1910, offer to make another test of said apparatus, but, on the contrary, the evidence shows that the defendant's offer to operate said apparatus was made contingent upon the defendant being given the opportunity and time to make certain and extensive repairs to defects which had resulted in the final test of said apparatus, and that at said time the defendant was neither able to, willing or desirous to continue the operation or make another test of said apparatus until some future time, at which time said extensive repairs on said apparatus would have been made.

The evidence is insufficient to support the finding in the respects mentioned.

XVII.

The court erred in making and filing the following portion of finding No. XII, as follows:

"It is not true that said apparatus is or was of no value to plaintiff by reason of its failure to have produced on an average of not less than 2,000,000 cubic feet of gas for each day of the said period; nor because

of its failure during said period to consume 35 pounds or less of lamp-black fuel per thousand cubic feet of gas made or for any other cause."

It appears from the evidence that the said apparatus of the defendant is and was of no value to the plaintiff by reason of its failure to produce on an average of not less than 2,000,000 cubic feet of gas per day of 24 hours, and because of its failure to produce gas with a consumption of not more than 35 pounds of lamp-black per thousand cubic feet of gas made, and by reason of its failure to produce gas having a candle-power of not less than 20 candles.

The evidence shows that the cost of labor to operate the defendant's water-gas apparatus is constant, regardless of the amount of gas produced by said apparatus, and that the smaller the generating capacity of said apparatus the more it would cost the plaintiff for labor to generate each thousand cubic feet of gas produced by it.

The evidence further shows that lamp-black fuel, such as was furnished to the defendant by the plaintiff, has a ready sale in the market of the city of Los Angeles at $9 to $10 per ton, and that the failure of such apparatus to produce gas with a consumption of not exceeding 35 pounds of lamp-black per thousand cubic feet of gas made, would have resulted in said apparatus consuming, based upon its rate of consumption of lamp-black fuel during said test from March 10th to March 30th, 1910, about $10,000 worth of lamp-black more per year than the said apparatus would have consumed had it developed a capacity to produce gas, using not

more than 35 pounds of lamp-black fuel for each one thousand cubic feet of gas produced.

And the evidence further shows that the failure of said apparatus to produce gas having a candle-power not less than 20 candles would necessitate the plaintiff increasing the candle-power of the oil-gas produced by its other sets, which could only be done at a considerable cost to the plaintiff, for this must be done through a process of mixing the two gases and thereby raising the candle-power of the gas produced in the defendant's apparatus to a marketable candle-power.

The evidence is insufficient to support the finding in the respects mentioned.

XVIII.

The court erred in making and filing the following portion of finding No. XII, as follows:

"The court finds that it is not true that the failure on the part of said apparatus during said period to produce the average quantity of gas above referred to, with the fuel consumption per thousand cubic feet above specified was without any fault on the part of the plaintiff."

It appears from the evidence that the failure on the part of said apparatus of the defendant, during said period from March 10th to March 30th, 1910, to produce the average quantity of gas referred to in the contract of July 12th, 1909, with a fuel consumption per thousand cubic feet of gas made, specified therein, was without any fault on the part of the plaintiff.

It appears from the evidence, and was admitted by the defendant, that in all respects except as to an al-

leged failure on the part of the plaintiff to supply the defendant during the operation of said apparatus from March 10th to March 30th, 1910, with lamp-black fuel of greater stability and tensile strength than that possessed by the lamp-black fuel actually furnished to the defendant, the plaintiff at all times and in every respect fully performed each and every condition and obligation on its part to be performed under the said contract of July 12th, 1909.

The evidence shows, as is hereinafter in this assignment of errors more particularly and fully alluded to, that the lamp-black fuel furnished by the plaintiff during said final test of said apparatus, was at all times lamp-black fuel such as was specified and provided for in the said contract of July 12th, 1909; that the tensile strength and stability of the lamp-black fuel furnished to the defendant during said final test of said apparatus was superior to and greater than that of any lamp-black fuel ever furnished or supplied to the defendant for the operation of its said apparatus since the 8th day of April, 1907; that said lamp-black fuel, so supplied to the defendant during said test, was lamp-black fuel of the exact quality and character that the defendant and the Los Angeles Gas and Electric Company had in mind and contemplated using at the time said contract of July 12th, 1909, was entered into.

The evidence is insufficient to support the finding in the respects mentioned.

XIX.

The court erred in making and filing the following portion of finding No. XII, as follows:

"That there never was a test of said apparatus under the conditions prescribed by the said contract."

It appears from the evidence that the test and operation of the said apparatus of the defendant, from March 10th to March 30th, 1910, inclusive, was a final test of said apparatus under the conditions prescribed by the contract of July 12th, 1909; that on the 9th day of March, 1910, the defendant notified the plaintiff, in writing, that at 6 o'clock a. m. on March 10th, 1910, it would commence the final twenty-day test of said apparatus, as provided for in said contract, and that in pursuance of said notification, the defendant did, on March 10th, 1910, commence the final test of said apparatus and did prosecute the same thereafter for twenty consecutive days until March 30th, 1910, at 6 o'clock a. m., at which time the defendant did, of its own accord, cease to operate the said apparatus, and that during said test the plaintiff at all times furnished and supplied to the defendant fuel and other operative conditions in full compliance with the obligations on its part to be performed under and by virtue of the contract of July 12th, 1909, and in all other respects complied with the said contract.

The evidence is insufficient to support the finding in the respects mentioned.

XX.

The court erred in making and filing the following portion of finding No. XII, as follows:

"The failure to test said apparatus, as provided in said contract, was due to the fault of the plaintiff."

The evidence shows that there was no failure to test said apparatus, as provided in said contract of July 12th, 1909, through or due to any fault of the plaintiff. On the contrary, the evidence shows that from March 10th to March 30th, 1910, a final test was had of said apparatus, such as was provided for under the contract of July 12th, 1909, and that during said final test of said apparatus the plaintiff furnished and supplied to the defendant, at all times during said test, fuel and operative conditions such as were required of it under the said contract of July 12th, 1909, and in all other respects performed all the conditions and obligations upon its part to be performed under said contract.

The evidence further shows that prior to the commencement of the operation of said apparatus, on the 10th day of March, 1910, the defendant notified the plaintiff, in writing, that it would commence the final test of the said apparatus on March 10th, 1910; that at said time the defendant did commence the final test of said apparatus and concluded the same on the 30th day of March, 1910. The evidence shows that prior to the commencement of said final test on March 10th, 1910, the defendant informed the plaintiff that all of the conditions furnished by the plaintiff for said test were perfectly satisfactory to the defendant, and notified the plaintiff that all of the fuel which plaintiff had on hand for the purpose of supplying the defendant during said test was satisfactory to the defendant, and such fuel as was called for under the contract of July 12th, 1909.

The evidence is insufficient to support said finding in the respects mentioned.

XXI.

The court erred in making and filing the following portion of finding No. XIII, as follows:

"It is not true that said apparatus was in a dilapidated condition" (at the time it ceased operating on March 30th, 1910).

It appears from the evidence that on the 30th day of March, 1910, the said apparatus of the defendant was in a dilapidated condition; that the charging floor of said apparatus was loose, and was in places raised and bulged out due to the expansion of the top of the generator; that the top of the generator was in a leaky condition, due to insufficient reinforced support, which would necessitate removing the entire top of the generator and installing large I-beams as supports thereof; that one of the most important valves connecting the generator with the carburetor was installed in a temporary and unsatisfactory manner; that a large quantity of the brick work in the superheater had melted and fallen down, and that all of the remaining brick work in the superheater and carburetor was so covered and clogged with carbon that before the apparatus could be further operated it would be necessary to remove all of the bricks in said superheater and carburetor, to reline the same and correct all of the defects as above set forth; that such changes would necessitate the expenditure of a large sum of money, and would consume considerable time.

The evidence is insufficient to support the finding in the respects mentioned.

XXII.

The court erred in making and filing the following portion of finding No. XIII, as follows:

"All of said defects could easily have been corrected" (referring to defects existing in said apparatus on March 30th, 1910).

It appears from the evidence that the defects existing in said apparatus on March 30th, 1910, could only be remedied by the expenditure of a large amount of money and several weeks of labor.

The evidence is insufficient to support the finding in the respect mentioned.

XXIII.

The court erred in making and filing that portion of finding XIII, as follows:

That the said defects were "conditions not infrequently resulting from the operation of such apparatus in the natural and ordinary course of operation."

It appears from the evidence that in January and February of 1910 the defendant expended about $8,000 in putting its said apparatus in perfect working order, and that at said time all of the brick work in said apparatus was in a perfect and clean condition; that from the 14th to the 16th of March, 1910, the defendant ceased making gas in its said apparatus, and did expend said time in cleaning out the brick work in its said apparatus; and that on the 30th day of March, 1910, the brick work in said apparatus was so choked and burned that the apparatus could not be further operated without taking out all of the brick work in said apparatus

and relining the same and reinforcing the top of the generator and making many other repairs; that in all the gas-generating sets operated by the plaintiff at its plant it was only customary to shut down said plants once a year for the purpose of recheckering or relining the same with new brick, and it is not a natural or usual thing, but on the contrary, it is a most unusual requirement for an apparatus to require relining and recheckering with bricks within a period of three or four months.

Furthermore there was no evidence of any apparatus ever operated by the plaintiff or the defendant requiring the reinforcement of the top of the generator, as a result of its operation, nor any evidence that temporary or imperfect valves is a condition resulting in the natural and ordinary operation of such water-gas apparatus.

The evidence is insufficient to support the finding in the respects mentioned.

XXIV.

The court erred in making and filing the following portion of finding No. XIII as follows:

"The defendant did offer to correct all of said imperfections" (existing in said apparatus on March 30th, 1910).

It appears from the evidence that the offer of the defendant to correct the imperfections existing in its said apparatus on March 30th, 1910, was made contingent upon the acceptance of said apparatus by the plaintiff or the agreement upon the part of the plaintiff to grant it another and additional test of said apparatus.

The evidence is insufficient to support the said finding in the respect mentioned.

XXV.

The court erred in making and filing the following portion of finding No. XIII, as follows:

The defendant did offer "to restore the said apparatus so that the same would be in first class order if the said plaintiff would permit the said work to be done and would accept said apparatus or permit a test of the same under the terms and provisions of the contract, or would permit an operation or test of the same under the conditions provided in the contract for any reasonable period that might be desired by plaintiff."

It appears from the evidence that the only offer made by the defendant to repair the dilapidated and imperfect condition of said apparatus after the 30th of March, 1910, was an offer to repair the same either upon the agreement upon the part of the plaintiff to accept said apparatus and pay therefor the purchase price, or an agreement upon the part of the plaintiff to grant another and additional test of said apparatus.

The evidence is insufficient to support the finding in the respect mentioned.

XXVI.

The court erred in making and filing the following portion of finding No. XIII, as follows:

"Plaintiff did not fully or completely perform each and all of the conditions upon its part under said contracts to be performed."

It appears from the evidence that the plaintiff did, at all times, fully and completely perform all of the conditions upon its part to be performed under said contract. The evidence shows that, except with respect to the claim of the defendant urged during the trial, that the lamp-black fuel furnished by the plaintiff during the final test of said apparatus did not possess the tensile strength and stability required of it under the contract of July 12th, 1909, the defendant admitted that the plaintiff had at all times fully and completely performed all the conditions on its part to be performed under said contract of July 12th, 1909. And the evidence further shows that all of the lamp-black fuel which was furnished by the plaintiff during the final test of said apparatus was lamp-black fuel of the kind and character called for and provided in said contract of July 12th, 1909.

The evidence is insufficient to support the finding in the respects mentioned.

XXVII.

The court erred in making and filing the following portion of finding No. XIII as follows:

That the plaintiff "failed to perform its obligations under said contracts in the particulars herein set forth."

The findings show that the particular to which the above portion of the finding refers was the alleged failure on the part of the plaintiff to furnish defendant with lamp-black fuel possessing tensile strength and stability such as the defendant claims was required under the contract of July 12th, 1909. But it appears

from the evidence that the lamp-black fuel furnished and supplied by the plaintiff to the defendant was, at all times, lamp-black fuel of the kind and character contracted for under said contract of July 12th, 1909; and that, as to the lamp-black fuel furnished to the defendant by the plaintiff during the final test of said apparatus from March 10th to March 30th, 1909, the defendant had examined the said fuel prior to the commencement of said test, and informed plaintiff, in writing, that the same was satisfactory to the defendant.

The evidence is insufficient to support the finding in the respects mentioned.

XXVIII.

The court erred in making and filing the following portion of finding No. XIV, as follows:

"The allegations of the 22nd paragraph of the complaint are not true."

The allegations of the 22nd paragraph of the complaint are as follows:

"That, by reason of the failure and refusal of defendant to return to plaintiff said sum of twenty-six thousand eight hundred twenty-three and 45/100 dollars ($26,823.45), and to remove said apparatus from plaintiff's premises, as aforesaid, plaintiff has been damaged in the sum of twenty-eight thousand three hundred twenty-three and 45/100 dollars ($28,323.45)."

It appears from the evidence that the plaintiff is and was damaged to the extent of $28,323.45 by reason of the failure and refusal of the defendant to return to

the plaintiff the sum of $26,323.45, and to remove the said apparatus of the defendant from the plaintiff's premises.

The evidence shows that under and by virtue of the contract of July 12th, 1909, the defendant agreed to return to plaintiff said sum of $26,323.45, if, during the final twenty-day test of said apparatus, as under said contract provided, it failed to bring its said apparatus to an average gas-making capacity, during said final test, of at least two million cubic feet per day, using not more than 35 pounds of lamp-black fuel containing not more than ten per cent of moisture per thousand cubic feet of gas made, and to produce a good commercial gas of not less than 20 candlepower.

It appears from the evidence that from the 10th to the 30th of March, 1910, the defendant had made such twenty-day final test of said apparatus as in said contract provided, and that during said test of said apparatus, without any fault on the part of the plaintiff, the said apparatus failed to produce an average of at least two million cubic feet of gas per day of 24 hours; that during said test said apparatus consumed more than 39 pounds of carbon, containing less than ten per cent of moisture, for each one thousand cubic feet of gas made; and that said apparatus did not, during said test, produce gas of an average candle-power of twenty candles.

The evidence further shows that the plaintiff, immediately after the 30th day of March, 1910, demanded of the defendant that it immediately return to the plaintiff the sum of $26,323.45; and requested that the de-

fendant remove from the plaintiff's premises its said apparatus; that the defendant has at all times refused to remove its said apparatus, and that the reasonable cost of removing the same is $2,000; that by reason of the failure of the defendant to pay the plaintiff the said sum of $26,323.45, and to remove its said apparatus from the premises of the plaintiff, the plaintiff has been damaged in the sum of $28,323.45.

The evidence is insufficient to support the finding in the respects mentioned.

XXIX.

The court erred in making and filing the following portion of finding No. XVI, as follows:

"The defendant did perform the obligations undertaken by it in said contract."

It appears from the evidence that the defendant did not perform the obligations undertaken by it under its contract of April 8th, 1907, or under its contract of July 12th, 1909. On the contrary, it appears from the evidence that prior to July 12th, 1909, the defendant had, at all times, failed to bring its said apparatus to a gas-making capacity of at least 2,000,000 cubic feet of gas per day of 24 hours; or to bring its apparatus to a capacity of producing one thousand cubic feet of gas, using not more than 35 pounds of lamp-black fuel, containing not more than 10 per cent of moisture; or to produce with its said apparatus a gas having a candle-power of not less than twenty candles; and that said failure on the part of the defendant was without any fault on the part of the Los Angeles Gas and Electric Company.

It further appears from the evidence that from the 10th day of March to the 30th of March, 1910, inclusive, the defendant did make a final test of its said water-gas apparatus, as contemplated and provided for under the contract of July 12th, 1909, and that during said test the defendant, without any fault on the part of the plaintiff, failed to bring its said apparatus to an established gas-making capacity, as in said contract provided, of at least 2,000,000 cubic feet of gas per day of 24 hours; and failed to produce one thousand cubic feet of gas, using not more than 35 pounds of lamp-black fuel, containing not more than ten per cent of moisture; and to produce a good commercial gas of not less than twenty candle-power.

The evidence shows that during said final test of said apparatus the said apparatus did not produce more than 1,800,000 cubic feet of gas per 24 hours, and did not produce gas with a consumption of less than 39 pounds of lamp-black fuel per thousand cubic feet of gas, or produce a good commercial gas of a candle-power greater than 19 candles; that at the termination of said test the said apparatus of the defendant was in a dilapidated and defective condition, and not in such a condition as would have enabled it to be further operated without an expenditure of considerable money and time for the purpose of repairing its many defects.

The evidence is insufficient to support the finding in the respects mentioned.

XXX.

The court erred in making and filing the following portion of finding No. XVI, as follows:

"Plaintiff did not perform the obligations undertaken by it in said contracts in this: that it did not, during said test, furnish lamp-black fuel of the quality called for by said contract."

It appears from the evidence that the lamp-black fuel furnished and supplied by the plaintiff to the defendant during the final test of said apparatus from March 10th to March 30th, 1910, and at all other times, was lamp-black fuel of the quality, kind and character called for in said contract of July 12th, 1909; that the plaintiff did not fail to perform the obligations undertaken by it under said contract of July 12th, 1909, by reason of the quality of lamp-black fuel furnished and supplied by it to the defendant during the said final twenty-day test of said apparatus. The evidence shows that neither the Los Angeles Gas and Electric Company or the plaintiff, in their contracts of April 8th, 1907, and July 12th, 1909, or at any other time, agreed to furnish and supply to the defendant lamp-black fuel of a chemical or physical quality or character different from that possessed by the lamp-black fuel furnished to the defendant during the said final twenty-day test of said apparatus; that between April 9th, 1908, and July 12th, 1909, the Los Angeles Gas and Electric Company had furnished to and the defendant company had used in its water-gas apparatus thousands of tons of bricked lamp-black fuel of the same chemical composition and physical characteristics as possessed by the lamp-black fuel furnished by the plaintiff and the defendant during the said final twenty-day test of said apparatus in March, 1910, and that at no time prior to July 12th, 1909, or at no time

thereafter had the defendant been supplied with lamp-black fuel having a greater tensile strength or stability, or of superior chemical or physical composition than that possessed by the lamp-black fuel furnished to the defendant during the said final twenty-day test of said apparatus.

The evidence further shows that at the time of entering into said contract of July 12th, 1909, the Los Angeles Gas and Electric Company was, with the knowledge of the defendant, the only concern in the United States producing lamp-black fuel in the form of brick, and that at said time and at all times thereafter the Los Angeles Gas and Electric Company and the plaintiff used in the manufacture of said bricks the best machinery procurable for such purpose, and did manufacture bricks with as great a tensile strength and stability as was possible to manufacture the same; that the defendant was at said time familiar with the character of the lamp-black bricks which the Los Angeles Gas and Electric Company had in the past furnished to it and which it was possible for the said company and plaintiff to furnish to it in the future; that at the time of entering into said contract of July 12th, 1909, the Los Angeles Gas and Electric Company did not inform the defendant, or represent to it, or did the defendant request of the Los Angeles Gas and Electric Company that the fuel which would be furnished to it under said contract of July 12th, 1909, should be of a chemical constituency or possess a greater tensile strength or solidity than that possessed by the lamp-black bricks theretofore furnished to the defendant, or different form, or greater

than that actually possessed by the lamp-black fuel which was supplied to the defendant during the final test of said apparatus from the 10th to the 30th of March, 1910.

The evidence further shows that in December, 1909, the plaintiff had accumulated a supply of about 3,000 tons of bricked lamp-black fuel, which it proposed to furnish to the defendant during the final test of the said apparatus, and so informed defendant; that the defendant did thereupon examine said fuel, and notified plaintiff orally and in writing that the same was satisfactory to the defendant for its use during the proposed final twenty-day test of said apparatus; that plaintiff did thereafter use every effort and protection to keep said fuel in the best possible condition and the defendant was, at all times prior to the 10th day of March, 1910, aware of the methods taken by the plaintiff in caring for and protecting the said fuel, and that the defendant, at no time prior to the 20th day of March, 1910, at which time it was in the midst of said twenty-day test, informed the plaintiff or claimed that the lamp-black fuel furnished by the plaintiff did not have the tensile strength and stability required of the lamp-black fuel under the contract of July 12th, 1909.

The evidence shows that all of the lamp-black fuel furnished and supplied by the plaintiff to the defendant during the said twenty-day final test of said apparatus was lamp-black fuel of the character provided in said contract of July 12th, 1909, and was lamp-black fuel of the best chemical composition and possessing the greatest tensile strength and solidity that it was possible for

the plaintiff, or any other person in the world at said time, to produce commercially; that it was at said time impossible for the plaintiff or any other person to have supplied the defendant with superior lamp-black brick fuel.

The evidence further shows that all of the lamp-black fuel furnished and supplied to the defendant by the plaintiff during said final twenty-day test of said apparatus was equal to and better than any lamp-black fuel ever theretofore furnished or supplied to the defendant by the Los Angeles Gas and Electric Company or the plaintiff.

The evidence is insufficient to support the finding in the respects mentioned.

XXXI.

The court erred in making and filing the following portion of finding No. XVI, as follows:

"The lamp-black fuel furnished defendant during said test contained from 10 to 15 per cent of impurities in the form of tar or other hydrocarbons and a small percentage of noncombustible ash."

It appears from the evidence that the tar, hydrocarbons and noncombustible ash occurring in the lamp-black fuel furnished by the plaintiff to the defendant did not constitute impurities in said lamp-black fuel; but, on the contrary, the evidence shows that lamp-black produced in the manufacture of gas by petroleum oil necessarily possesses a certain percentage of tar, hydrocarbons and noncombustible ash, and that in the trade and art of gas manufacture such elements are considered as ever-

present constituents of lamp-black as known in the trade of gas manufacture.

The evidence further shows that the lamp-black briquettes furnished to the defendant, and analyzed prior to April 8th, 1907, contained the same constituents as did the lamp-black fuel furnished to the defendant for its final test in March, 1910; that the defendant, prior to April 8th, 1907, and at all times thereafter, had knowledge of the exact chemical constituency of said lamp-black, and used such term in said contract of April 8th, 1907, and July 12th, 1909, with full knowledge and understanding that the lamp-black provided for in said contract was not and would not be chemically pure carbon.

The evidence is insufficient to support the finding in the respects mentioned.

XXXII.

The court erred in making and filing the following portion of finding No. XVI, substantially and in effect as follows:

The lamp-black furnished by the plaintiff to the defendant during said final test was not fuel of the kind and character specifically provided for in the contract of July 12th, 1909.

It appears from the evidence that the lamp-black fuel furnished by the plaintiff to the defendant during said final test of said apparatus from March 10th to March 30th, 1910, was fuel of the kind and character specifically provided for in the contract of July 12th, 1909.

It further appears from the evidence that the defend-

ant had, at no time prior to July 12th, 1909, seen or examined any lamp-black produced as a by-product of oil-gas manufacture, made in the form of an ordinary building brick, except such lamp-black as was bricked at the plant of the Los Angeles Gas and Electric Company, and that the said Los Angeles Gas and Electric Company was at said time, and at all times thereafter, the only concern in the United States which produced and manufactured lamp-black bricks of the size and form of the lamp-black bricks supplied to the defendant in the operation of its water-gas set; that the Los Angeles Gas and Electric Company and the plaintiff at all times used in the manufacture of its lamp-black bricks the best and most efficient machinery known or procurable for such purposes, and there was no evidence that at any place in the United States lamp-black bricks were manufactured or produced, commercially, of a physical or chemical quality or character equal to or different from or better than those produced by the Los Angeles Gas and Electric Company and the plaintiff, and supplied to the defendant at all times for the operation of its said apparatus, and that between the 8th day of April, 1907, and the 12th day of July, 1909, the Los Angeles Gas and Electric Company had supplied to the defendant and the defendant had used in the operation of its water-gas set thousands of tons of lamp-black bricks, having a tensile strength and solidity less than the sample briquette furnished to the defendant prior to April 8th, 1907, and having a tensile strength not greater than the lamp-black bricks furnished to the defendant by the plaintiff between the period of March

10th to March 30th, 1910; and that at the time defendant entered into said contract of July 12th, 1909, it did not request of the Los Angeles Gas and Electric Company, nor even suggest, that the brick lamp-black fuel which should be supplied to it under said contract should have a tensile strength or solidity equal to the sample briquette furnished to it prior to April 8th, 1907, or a tensile strength or solidity greater than or different from the lamp-black bricks used by the defendant between the said April 8th, 1907, and the 12th day of July, 1909.

And the evidence further shows that the Los Angeles Gas and Electric Company did not at any time prior to the said 12th day of July, 1909, or on said date, or at any time thereafter represent to the defendant that the lamp-black fuel which would be supplied to it under said contract of July 12th, 1909, would have a tensile strength equal to the briquettes furnished to the defendant prior to April 8th, 1907, or different from or greater than the tensile strength and solidity of the lamp-black bricks furnished and supplied to the defendant between the 8th day of April, 1907, and the 12th day of July, 1909, or a tensile strength or solidity greater than that actually possessed by the lamp-black bricks which were later supplied by the plaintiff to the defendant during the period from March 10th to March 30th, 1910, and that after said 12th day of July, 1909, and at various times up to the 10th day of March, 1910, the plaintiff furnished and supplied to the defendant thousands of tons of lamp-black brick fuel possessing a tensile strength and solidity not greater than that possessed by

the lamp-black bricks theretofore furnished to the defendant and thereafter furnished to the defendant during the final test of said apparatus, and the defendant at no time prior to the 20th day of March, 1910, claimed, suggested, or even intimated that the lamp-black fuel furnished and supplied by the plaintiff or its assignor at any time prior thereto possessed a tensile strength or solidity, or physical quality different from that which the plaintiff or its assignor had, either in the contract of April 8th, 1907, or the contract of July 12th, 1909, agreed to furnish or supply to the defendant, but, on the contrary, the defendant had during the months following November, 1909, up to the first day of March, 1910, witnessed the production and storage by the plaintiff in its yards of 3,000 tons of lamp-black bricks which the plaintiff stated to the defendant that it intended to furnish and supply to the defendant during the final test of its said apparatus, and which the defendant expected the plaintiff would furnish and supply to it at said time, and that it had the opportunity to, and did at various times examine such fuel and test the same, and did, in the latter part of December, 1909, inform the plaintiff in writing that said 3,000 tons of lamp-black brick fuel was satisfactory and would be suitable to the defendant as fuel for use during the final test of its said apparatus, under the contract of July 12th, 1909.

The evidence further shows that all of the fuel furnished by the plaintiff to the defendant was taken from said pile of 3000 tons of lamp-black bricks which had theretofore been supplied to the defendant, and were all the lamp-black bricks furnished by the plaintiff to the

defendant during the final test of said apparatus, and were lamp-black bricks of the best quality, both physically and chemically, that it was possible for the plaintiff or any other person at said time to manufacture or produce.

The evidence is insufficient to support the finding in the respects mentioned.

XXXIII.

The court erred in making and filing the following portion of finding No. XVI as follows:

The lamp-black bricks furnished by the plaintiff to the defendant during said final test had been treated in such a manner as to "leave voids therein."

It appears from the evidence that in the manufacture of lamp-black bricks small air-chambers necessarily are formed in said bricks; that it is impossible to manufacture the same without the presence of said air spaces occurring at times in the said bricks.

The evidence is insufficient to support the finding in the respect mentioned.

XXXIV.

The court erred in making and filing the following portion of finding No. XVI as follows:

The said lamp-black bricks "had been insufficiently compressed."

There is no evidence that the lamp-black bricks furnished by the plaintiff to the defendant from March 10th to March 30th, 1910, were insufficiently compressed; but, on the contrary, it appears from the evi-

dence that all of the said bricks were compressed to as high a degree as possible; that the plaintiff is the only person in the United States engaged in the manufacture of lamp-black bricks and that in the production of the same the plaintiff used at all times the best possible machinery and methods; and no evidence was introduced during the trial of the production by anyone, or of the possibility of production, commercially, of lamp-black bricks compressed in any manner superior to the bricks produced by the plaintiff at said time and furnished to the defendant; that all of the lamp-black fuel furnished by the plaintiff to the defendant during said final test, was compressed to a degree and in a manner not inferior to any lamp-black bricks ever theretofore furnished to the defendant by the plaintiff.

The evidence is insufficient to support the finding in the respect mentioned.

XXXV.

The court erred in making and filing the following portion of finding No. XVI as follows:

The said bricks furnished by the plaintiff to the defendant during said final test were "so unstable that they were not able to withstand, and did not withstand the jarring necessarily incident to handling the same for fuel purposes in such apparatus."

It appears from the evidence that all of the lamp-black fuel furnished by the plaintiff to the defendant was sufficiently stable to withstand the jarring necessarily incident to handling the same for fuel purposes in the defendant's apparatus. The evidence shows that

practically every brick delivered by the plaintiff to the defendant during said test was delivered at the base of the fuel chute of the defendant's apparatus in the perfect form of a brick, and that thereafter the handling of said fuel was conducted in such a manner as best suited the defendant, and entirely by its employees; that in the handling of said fuel, defendant carried the same to a great height in buckets, from whence it was dumped down into a bin in large quantities and from thence again dropped a great distance into the generator, which said handling necessarily resulted in the breaking up of a certain portion of the bricks; that the matter of handling said fuel was one lying solely in the power of the defendant, and that the defendant could have supplied the generator with fuel by the use of wheelbarrows and other devises which would practically have prevented any of the said bricks from breaking; that it is not unusual for lamp-black bricks to become broken in handling the same for fuel purposes in gas generators.

The evidence is insufficient to support the finding in the respect mentioned.

XXXVI.

The court erred in making and filing the following portion of finding No. XVI as follows:

"Notwithstanding the protest of the defendant during said test, plaintiff did furnish to the defendant bricks which had been and were being throughout the entire test subjected to external, artificial heat, or kiln-drying, for the purpose of driving out moisture therefrom."

It appears from the evidence that it is impossible to manufacture a lamp-black brick from crude lamp-black containing less than 15 to 20 per cent of moisture; that therefore, to the knowledge of the defendant, the plaintiff and its assignor at all times produced lamp-black bricks containing from 15 to 20 per cent of moisture when first made, and that all of said bricks were thereafter reduced in moisture content, either by drying the same in the sun or by means of artificial heat. The evidence shows that as early as December, 1909, the plaintiff had, in order to be able to furnish defendant with the best possible character of fuel for the final test of its apparatus, accumulated about 3000 tons of lamp-black bricks, which it proposed to furnish to the defendant during the final test of said apparatus; and the plaintiff had, by means of exposing said bricks to the sun for several months succeeded in reducing all of said bricks to a moisture content of less than 10 per cent; that during said month of December, 1909, the plaintiff did inform the defendant of the purpose for which it intended to use said 3000 tons of brick, and the defendant did thereupon examine said bricks, and stated to the plaintiff in writing that the same were satisfactory to it for use in said final test. The evidence shows that the plaintiff thereupon, at the suggestion of the defendant, covered said pile of bricks with sheet iron and other substances to protect the same from the rains which occurred in the spring; that during January, February and March, 1910, there was a large and excessive rainfall in the city of Los Angeles, and that a considerable portion of said 3000 tons of brick by reason of their

physical character, and without any fault on the part of the plaintiff absorbed considerable moisture from the atmosphere so that by the latter part of February a large portion of said bricks were of a moisture content greater than 10 per cent; that, thereupon, plaintiff did at great expense, to the knowledge of the defendant and without any protest from said defendant, proceed to drive the excessive moisture from said bricks in the only possible manner, to-wit, by repiling said bricks in the form of kilns and driving the moisture therefrom by means of artificial heat. The evidence shows that by employing said means the plaintiff did reduce the moisture content of all the said bricks furnished to the defendant during its said final test to a degree less than 10 per cent, and that by the 10th day of March, 1910, all of said bricks furnished to the defendant during said final test had been dried to a proper degree of moisture; that thereafter, plaintiff ceased to apply said artificial heat to the said bricks.

The evidence further shows that the defendant at no time made any objection to the manner in which the plaintiff had dried the said bricks, or to the character of said bricks after drying, until about the 20th day of March, 1910, at which time it was impossible for the plaintiff to furnish or supply defendant with bricks any different from those which it was supplying to it; that bricks dried by means of artificial heat, or kiln-dried, possess a tensile strength as great, if not greater, than those bricks dried by means of the sun, and are in all other respects identical with lamp-black bricks dried by means of natural sun heat.

The evidence is insufficient to support the finding of the court in the respects mentioned.

XXXVII.

The court erred in making and filing the following portion of finding No. XVI as follows:

The plaintiff did furnish the defendant during said test bricks which were "unstable and easily disintegrated."

It appears from the evidence that all of the bricks furnished to the defendant by the plaintiff, during the final test, were as above set forth more particularly in our assignment of errors the most suitable bricks which it was possible for the plaintiff or any other person to produce, commercially, and that the said bricks were of such stability as to withstand all the necessary handling of the same incident to the preparation and drying of said bricks, and the hauling of the same to its generator, and that any breakage that thereafter occurred in said bricks was due to the handling of the same by the defendant's agents; and that in the handling of the same by the defendant, said bricks were submitted to unusual and violent usage and handling, which caused a small portion of the same to become broken and disintegrated.

The evidence is insufficient to support the finding in the respects mentioned.

XXXVIII.

The court erred in making and filing the following portion of finding No. XVI as follows:

"Practically all of the bricks furnished to the defendant during said test were of such an unsubstantial

character that great quantities of them were necessarily broken up and crumbled in the handling of them."

It appears from the evidence, as specified in the last assignment of error, that the lamp-black bricks were not of an unsubstantial character and were not necessarily broken up or crumbled in the handling of them; and it further appears from the evidence that only a small portion of the bricks supplied to the defendant did crumble up during the handling of the same by the defendant.

The evidence is insufficient to support the finding in the respect mentioned.

XXXIX.

The court erred in making and filing that portion of finding No. XVI as follows:

"This crumbling and powdering took place to such an extent as that great quantities of fine pulverized and crumbled material unavoidably found its way into the generator, with the result that the fuel bed was packed, and its efficiency largely impaired, and with the further result that excessive and extraordinarily large quantities of dust were blown over from the generator into the carburetor and tended to form a deposit upon the brick work in the carburetor, and to materially retard its function and impair its capacity."

It appears from the evidence that the reason why large quantities of fine carbon passed from the generator into the superheater was because the defendant's agent at the last moment before commencing the final test of said apparatus, contrary to the plan of operation outlined and contemplated by the defendant company's

president and engineers, doubled the amount of air blast injected into the generator of said apparatus, and that said excessive air blast was the reason why the large quantities of fine carbon were carried from the generator into the carburetor, and further, that the defendant under its contract of July 12th, 1909, specifically agreed to increase the capacity of said apparatus for catching and handling such fine dust as was apt to pass from the generator to the carburetor. The evidence shows that the defendant, subsequent to July 12th, 1909, doubled the size of the generator that it had theretofore used, and that the engineers of the defendant company, in considering whether they had provided sufficient capacity for handling said fine dust, which is necessarily expected to pass from the generator into the carburetor, only counted upon the operator of said apparatus using one-half of the amount of blast which said operator actually subjected said generator to during said final test of said apparatus, and that it was by reason of the aforesaid acts of the defendant and not otherwise that such large quantities of dust were carried from the generator into the carburetor and resulted in the impairment of the operating capacity of said machine.

The evidence is insufficient to support the finding in the respects mentioned.

XL.

The court erred in making and filing the following portion of finding No. XVI as follows:

"Throughout said test plaintiff continued to supply bricks of the character above described, to-wit, so en-

tirely lacking in firmness and stability as that practically all of them broke more or less in handling."

It appears from the evidence that only a small percentage of the lamp-black bricks actually placed by the defendant in its generator were broken, and that practically every brick delivered by the plaintiff to the defendant at the base of its fuel chute was in a perfect brick form.

It appears further from the evidence that all the lamp-black brick furnished by the plaintiff to the defendant were lamp-black bricks possessing as great a degree of firmness and stability as possible for them to possess, and that all of said bricks did possess such a degree of firmness and stability as was required under the contract of July 12th, 1909.

The evidence is insufficient to support the finding in the respects mentioned.

XLI.

The court erred in making and filing the following portion of finding No. XVI as follows:

"Great quantities" (of the bricks furnished by the plaintiff) "crumbled and pulverized to such an extent that at times more than one-third and almost constantly as much as 15% or 20% was screened out as waste."

It appears from the evidence that the term "waste" used in the above finding refers to the fine carbon dust which the defendant abstracted from the lamp-black fuel by means of large slits and holes which it placed in its fuel chute leading to the generator; that the percentage of fine carbon which the defendant thus removed was material which would have made good fuel

if used in said generator; and that the existence of said fine carbon was due almost entirely to the rough and violent manner in which the defendant handled said lamp-black fuel after it was delivered to it by the plaintiff. The evidence shows that the amount of fine carbon which the plaintiff obtained in using the lamp-black fuel furnished to it by the plaintiff during the final test of said apparatus was not greater than that encountered by the defendant at all times prior thereto in the operation of said apparatus.

The evidence is insufficient to support the finding in the respects mentioned.

XLII.

The court erred in making and filing the following portion of finding No. XVI as follows:

"At least as much more" (of the waste) "unavoidably went into the generator with the serious detrimental effects above described."

It appears from the evidence that only a very small percentage of said fine carbon went into the generator, and that the effect of the presence of said fine dust in the generator would not have been detrimental to the said apparatus had it not been for the fact that the defendant's representative and operator used during the final test of said apparatus an air blast double in force to that which the defendant company had contemplated and designed that said apparatus should use and accommodate, and that by means of said excessive air blast a large portion of the fine carbon in the generator was blown from the generator into the carburetor before it could be consumed by the fire in the generator;

and that such a condition was without any fault on the part of the plaintiff.

The evidence is insufficient to support the finding in the respect mentioned.

XLIII.

The court erred in making and filing the following portion of finding No. XVI as follows:

"In the operation of all gas apparatus it is customary and necessary" to shut down said apparatus at some regular interval for the purpose of burning out and cleaning out the apparatus.

It appears from the evidence that the contract of July 12th, 1909, between the defendant and the plaintiff's assignor did not contain any provision allowing the defendant to shut down its said apparatus for the purpose of burning out and cleaning out the same during the final test of said apparatus; but said contract, on the contrary, provided that during the final test of said apparatus, said machine should be operated for 20 consecutive days. It further appears from the evidence that while it is customary at the plaintiff's plant to cease making gas every seven days in order to burn out and clean out the generator, that such practice is followed with such generators as are kept in steady operation throughout the entire year; that it is not customary, and should not have been necessary in the operation of a gas generator for a twenty-day test, such as was provided for in the contract of July 12th, 1909, to shut down said apparatus at any time during the twenty-day test for the purpose of burning out and

cleaning out the same; and that said contract of July 12th, 1909, was entered into without any agreement, understanding or expectation that the said apparatus of the defendant should be shut down at any time during said final test for such purpose.

The evidence does not support the finding in the respect mentioned.

XLIV.

The court erred in making and filing the following portion of finding No. XVI as follows:

"A burning and cleaning out period of one day out of seven is a proper, practical and reasonable custom in the proper operation of such a water-gas set as is involved here."

It appears from the evidence that a burning out and cleaning out period of one day out of seven is not a proper, practical and reasonable custom in the proper operation of such a water-gas set as that possessed by the defendant under such a twenty-day test as was provided for in said contract of July 12th, 1909; that the burning out and cleaning out period of one day in seven is a custom peculiar to the plaintiff company, and is a custom used and adopted only in the operation of such apparatus as are kept in continuous operation throughout an entire period of twelve months.

It further appears from the evidence that the contract of July 12th, 1909, does not provide for any such shutting down period during the final twenty-day test of defendant's apparatus; and that such event was not contemplated even by the parties at the time said contract was entered into.

The evidence is not sufficient to support the finding in the respect mentioned.

XLV.

The court erred in making and filing the following portion of finding No. XVI as follows:

"The average quantity of gas produced per 24 hours during the seventeen days on which the apparatus was actually operated was slightly in excess of two million cubic feet per day."

It appears from the evidence that if the total amount of gas produced by said apparatus of the defendant from March 10 to March 30, 1910, is divided by a factor of 17, that the result would be an average of over 2,000,000 cubic feet per day; but the evidence shows that such portions of the 14th, 15th and 16th days of March, 1910, as was taken by the defendant to clean out its generator is, in gas-making practice, considered as part of the operating period of said apparatus, and that under the contract of July 12th, 1909, the average capacity of said apparatus of the defendant as demonstrated during its final test from the 10th to the 30th of March, 1910, is obtained only by dividing the total production of the gas produced during said period by a divisor of 20.

The evidence is insufficient to support the finding of the court in the respects mentioned.

XLVI.

The court erred in making and filing the following portion of finding No. XVI as follows:

"A test of 20 or more consecutive days was never had of the said apparatus."

It appears from the evidence that a test of 20 consecutive days was had of said apparatus as in said contract of July 12th, 1909, provided; that on the 9th day of March, 1910, the defendant notified the plaintiff in writing that at 6 o'clock a. m. on March 10th, 1910, it would commence the final 20-day test of its said apparatus, as provided for in said contract of July 12th, 1909, and that at 6 o'clock a. m., March 10th, 1910, the defendant did commence the final test of said apparatus, and did prosecute the same for the next 20 consecutive days, to-wit, until 6 o'clock a. m., March 30th, 1910, at which time the defendant, of its own accord, ceased to operate said apparatus, and announced that it had completed the test of the same.

The evidence further shows that during said test and at all times the plaintiff had fully performed each and every obligation and condition upon its part to be performed under said contract of July 12, 1909, and had during the said final test of said apparatus furnished and afforded the defendant all the operative conditions and character of fuel required to be furnished by it under said contract of July 12th, 1909.

The evidence is insufficient to support the finding in the respects mentioned.

XLVII.

The court erred in making and filing the following portion of finding No. XVI as follows:

"A test of 20 or more consecutive days was never had

of the said apparatus with fuel of the character and quality provided to be furnished by the plaintiff to the defendant in the said contract."

It appears from the evidence that a test of 20 consecutive days, as provided for in said contract of July 12th, 1909, was had of the said apparatus of the defendant in its operation from March 10th to March 30th, 1910, and that during said test said apparatus was furnished by the plaintiff with the character and quality of fuel which the plaintiff was obliged to furnish the defendant under the contract of July 12th, 1909.

It further appears from the evidence that prior to the commencement of said test the defendant notified the plaintiff in writing that all of the fuel which the plaintiff then had on hand, and which it later furnished to the defendant during said test was satisfactory to the defendant; that all the fuel furnished to the defendant during said test was fuel of the kind and character which the parties contracted should be furnished under the contract of July 12th, 1909.

In assignments of errors heretofore set forth, plaintiff has set forth other particulars more in detail in which the aforesaid finding of the court is not supported by the evidence. All of the said particulars set forth in aforesaid mentioned assignments are made a part hereof with the same force and effect as if set forth herein.

The evidence is insufficient to support the finding in the respect mentioned.

XLVIII.

The court erred in making and filing the following portion of finding No. XVI as follows:

"Nor was the test of the said apparatus carried on from the 10th to the 30th of March as aforesaid, such a test as the contract provided for."

It appears from the evidence that the test of the said apparatus carried on from the 10th to the 30th of March, 1910, was such a test as the contract of July 12th, 1909, provided for; that during said test plaintiff at all times fully performed all conditions and obligations upon its part to be performed, and did during such test furnish and supply to the defendant all such operating conditions and fuel as in said contract provided; that the defendant did at the commencement of said test announce to the plaintiff in writing that the said test was a final test of said apparatus as in said contract of July 12th, 1909, provided.

The assignment of errors heretofore set forth, addressed to findings of the court similar in substance to the finding herein, which point out more in detail particulars in which the aforesaid finding is unsupported by the evidence, and all statements of evidence contained in the aforesaid assignment of errors are made a part hereof with the same force and effect as if set forth herein.

The evidence is insufficient to support the finding in the respect mentioned.

XLIX.

The court erred in making and filing the following portion of finding No. XVI as follows:

"Nor was the same such a test as would properly or fairly indicate or determine the capacity or economy of operation of said apparatus for 20 or more consecutive days, or as a permanent operating apparatus or otherwise."

It appears from the evidence that the said final test of said apparatus was such a test as would and did fairly indicate and determine the capacity and economy of operation of said apparatus for 20 or more consecutive days, and its maximum capacity as a permanent operating apparatus. The evidence shows that all of the operative conditions, and all the fuel and material furnished and supplied by the plaintiff to the defendant during said final test of said apparatus was fuel and were operative conditions such as were called for under the contract of July 12th, 1909; that at the commencement of said test the said apparatus of the defendant was in a proper condition; and that during said test the said apparatus had produced more gas with better fuel economies than it had at any time theretofore during any operation thereof; that during said test the plaintiff fulfilled each and all the conditions upon its part to be fulfilled under the contract of July 12th, 1909.

The evidence is insufficient to support the finding in the respects mentioned.

L.

The court erred in making and filing that portion of finding No. XVII as follows:

"That during said test defendant repeatedly protested against the character of the bricks furnished."

It appears from the evidence that prior to the commencement of said final test, the defendant notified the plaintiff in writing that the store of bricks which the plaintiff had on hand for use during said final test was satisfactory and would be acceptable to the defendant for use during said final test from the 10th to the 30th of March, 1910.

It further appears from the evidence that the defendant at no time protested against the character of the bricks furnished during said final test until at a time about the middle of the said test; that at said time the plaintiff did not have in its possession any bricks of a character different from or better than those which it was supplying to the defendant at that time, and had theretofore supplied to it during said test, or at any other time.

The evidence is insufficient to support the finding in the respect mentioned.

LI.

The court erred in making and filing the finding that the plaintiff is not entitled to recover of the defendant the sum of $28,323.45, or any part thereof.

It appears from the evidence that from March 10th to March 30th, 1910, the defendant made such a final test of its said apparatus as provided for in the contract of July 12th, 1909, and that during said test, and at all times, the plaintiff fully performed all the conditions and obligations on its part to be performed under said contract; that during said final test the said apparatus, without any fault on the part of the plaintiff, failed to produce for 20 consecutive days an average of at least

2,000,000 cubic feet of gas per 24 hours, and did, during said test, fail to produce gas with a consumption of not more than 35 pounds of lamp-black fuel, containing not more than 10 per cent of moisture, per thousand cubic feet of gas made; and that said apparatus during said final test failed to produce a good, commercial gas having an average candle-power of not less than twenty candles.

The evidence further shows that after the said test of said apparatus, the plaintiff demanded that the defendant pay to the plaintiff the sum of $26,323.45, which the defendant has at all times refused to do; that plaintiff did at said time demand that the *defendant* remove its apparatus from the premises of said plaintiff, which the defendant at all times refused to do; that the reasonable cost of removing said apparatus was $2000, and that under and by virtue of the contract of July 12th, 1909, the plaintiff was entitled to recover from the defendant the said sum of $28,323.45.

LII.

The court erred in failing to find and decide that the plaintiff is entitled to judgment against the defendant in the sum of $28,323.45.

It appears from the evidence that from March 10th to March 30th, 1910, the defendant made a final test of its said apparatus as provided for in the contract of July 12th, 1909; that during said test, and at all times, the plaintiff fully performed all the conditions and obligations on its part to be performed under said contract. The evidence shows that during said final test, the said

apparatus, without any fault on the part of the plaintiff, failed to produce for twenty consecutive days an average of at least 2,000,000 cubic feet of gas per 24 hours; and did, during said test, fail to produce gas with a consumption of not more than 35 pounds of lamp-black fuel containing not more than 10 per cent of moisture per thousand cubic feet of gas made, and that said apparatus during said final test failed to produce a good, commercial gas having an average candle-power of not less than twenty candles.

The evidence further shows that after the said test of said apparatus, the plaintiff demanded that the defendant pay to the plaintiff the sum of $26,323.45, which the defendant has at all times refused to do; that plaintiff did at said time demand that the defendant remove its said apparatus from the premises of said plaintiff, which the defendant at all times has refused to do; and that the reasonable cost of removing said apparatus was $2000, and under and by virtue of the contract of July 12th, 1909, the plaintiff was entitled to recover from the defendant the said sum of $28,323.45.

LIII.

The court erred in failing to find and decide that the plaintiff was entitled to recover from the defendant the sum of $26,323.45.

It appears from the evidence that from March 10th to March 30th, 1910, the defendant made such a final test of its said apparatus as was provided for in the contract of July 12th, 1909, and that during said test, and at all times, the plaintiff fully performed all the

conditions and obligations on its part to be performed under said contract; that during said final test the said apparatus, without any fault on the part of the plaintiff, failed to produce for 20 consecutive days an average of at least 2,000,000 cubic feet of gas per 24 hours; and did, during said test, fail to produce gas with a consumption of not more than 35 pounds of lamp-black fuel containing not more than 10 per cent of moisture, per thousand cubic feet of gas made; and that said apparatus, during said final test, failed to produce a good, commercial gas having an average candle-power of not less than 20 candles.

The evidence further shows that after the said test of the said apparatus, the plaintiff demanded that the defendant pay to the plaintiff the sum of $26,323.45, which the defendant has at all times refused to do; and that under and by virtue of the said contract of July 12th, 1909, the plaintiff was entitled to recover from the defendant the said sum of $26,323.45.

LIV.

The court erred in failing to enter judgment against the said defendant and in favor of the plaintiff for the sum of $28,323.45.

It appears from the evidence that from March 10th to March 30th, 1910, the defendant made such a final test of its said apparatus, as provided for in the contract of July 12th, 1909; that during said test, and at all times, the plaintiff fully performed all the conditions and obligations on its part to be performed under said contract; that during said final test the said apparatus,

without any fault on the part of the plaintiff, failed to produce for 20 consecutive days an average of at least 2,000,000 cubic feet of gas per 24 hours, and did, during said test, fail to produce gas with a consumption of not more than 35 pounds of lamp-black fuel, containing not more than 10 per cent of moisture, per thousand cubic feet of gas made, and that said apparatus during said final test failed to produce a good, commercial gas having an average candle-power of not less than twenty candles.

The evidence further shows that after the said test of said apparatus, the plaintiff demanded that the defendant pay to the plaintiff the sum of $26,323.45, which the defendant refused and has at all times so refused to do; that the plaintiff did at said time demand that the defendant remove its apparatus from the premises of said plaintiff, which the defendant at all times refused to do; and that the reasonable cost of removing said apparatus was $2000, and that under and by virtue of the contract of July 12th, 1909, the plaintiff was entitled to recover the sum of $28,323.45 from the said defendant.

LV.

The court erred in failing to enter judgment against the said defendant and in favor of the said plaintiff in the sum of $26,323.45.

It appears from the evidence that from March 10th to March 30th, 1910, the defendant made such a final test of its said apparatus as provided for in the contract of July 12th, 1909, and that during said test, and at all

times herein, the plaintiff fully performed all the conditions and obligations on its part to be performed under said contract; that during said final test the said apparatus, without any fault on the part of the plaintiff, failed to produce for 20 consecutive days an average of at least 2,000,000 cubic feet of gas per 24 hours, and did during said test fail to produce gas with a consumption of not more than 35 pounds of lamp-black fuel containing not more than 10 per cent of moisture per thousand cubic feet of gas made; and that said apparatus during said final test failed to produce a good, commercial gas having an average candle-power of not less than twenty candles.

The evidence further shows that after the said test of said apparatus, the plaintiff demanded that the defendant pay to the plaintiff the sum of $26,323.45, which the defendant refused at all times to do, and that under and by virtue of the contract of July 12th, 1909, the plaintiff was entitled to recover from the defendant the said sum of $26,323.45.

LVI.

The court erred in failing to find that the lamp-black fuel furnished by the plaintiff to the defendant, during said final test, was fuel in accordance with the contract of July 12th, 1909.

It appears from the evidence, as set forth in assignment of error No. XXXII, that all of the lamp-black fuel which was furnished to the defendant by the plaintiff during said final test from the 10th to the 30th of March, 1910, for use in its said apparatus, was fuel in accordance with the contract of July 12th, 1909.

The statements as to what the evidence showed in this regard, contained in said assignment of error No. XXXII, are made a part hereof with the same force and effect as if set forth in detail herein.

LVII.

The court erred in failing to find that the operation of said water-gas apparatus by the defendant during the period from March 10th to March 30th, 1910, was a final test of said apparatus as contemplated and provided for in said contract of July 12th, 1909.

It appears from the evidence that the operation of said water-gas apparatus by the defendant during the period from March 10th to March 30th, 1910, was a final test of said apparatus as contemplated and provided for in said contract of July 12th, 1909; that prior to the commencement of said final test, the defendant notified the plaintiff in writing that on the 10th day of March, 1910, it would commence the final test of its apparatus; that on the said 10th day of March, 1910, the defendant did commence said final test, and did operate said apparatus continuously for the next twenty days; and that during said test the plaintiff, at all times, furnished the defendant with operating conditions and fuel in accordance with the contract of July 12th, 1909, and in all other respects fully complied with the conditions and obligations of the said contract of July 12th, 1909.

LVIII.

The court erred in failing to find that the defendant during said final test of said apparatus from March

10th to March 30th, 1910, inclusive, failed to bring its said water-gas apparatus to an established capacity, as provided in said contract of July 12th, 1909, of at least 2,000,000 cubic feet of gas per 24 hours.

The evidence shows that during the final test of said apparatus from March 10th to March 30th, 1910, the defendant failed to bring its said apparatus to an established capacity, as provided in said contract of July 12th 1909, of at least 2,000,000 cubic feet of gas per 24 hours; and that said failure was not due to any fault of the plaintiff; that the operation of said apparatus during said period was such a final test of said apparatus as in said contract of July 12th, 1909, provided; and that said plaintiff at all times fully performed all conditions upon its part to be performed under said contract.

LIX.

The court erred in failing to find that during said period, to-wit, from March 10th to March 30th, 1910, said defendant failed to bring said apparatus to an established capacity of producing gas with a consumption of not more than 35 pounds of lamp-black fuel per thousand cubic feet of gas made.

The evidence shows that from March 10th to March 30th, 1910, the said apparatus was operated under and according to the terms of the contract of July 12th, 1909, in a final test of said apparatus; that during said test the plaintiff at all times performed all the conditions and obligations upon its part to be performed under said contract; and that said apparatus, during said final test, and without any fault on the part of the

plaintiff, failed to reach an established capacity, as in said contract provided, of producing gas with a consumption of 35 pounds of lamp-black fuel per thousand cubic feet of gas made.

LX.

The court erred in failing to find that during said final test of said apparatus from March 10th to March 30th, 1910, inclusive, the defendant failed to bring said apparatus to an established capacity of producing during said period gas of an average candle-power of at least 20 candles.

It appears from the evidence that from March 10th to March 30th, 1910, inclusive, the defendant operated said apparatus in a final test, as in said contract of July 12th, 1909, provided; that during said test the plaintiff at all times performed all conditions and obligations upon its part under said contract; that during said test the defendant, without any fault on the part of the plaintiff, failed to bring said apparatus to a capacity of producing, during said period, gas of an average candle-power of at least 20 candles.

LXI.

The court erred in failing to find that the plaintiff had at all times performed all the conditions and obligations imposed upon it by and under the said contract of July 12th, 1909.

It appears from the evidence that the plaintiff at all times performed all the conditions and obligations imposed upon it by and under said contract of July 12th, 1909. It was admitted by the defendant, that the plain-

tiff performed all the conditions upon its part to be performed under said contract, with the sole exception that the lamp-black fuel furnished by the plaintiff to the defendant during the final test of defendant's said apparatus did not, according to defendant, possess the tensile strength and solidity required of it under the contract of July 12th, 1909.

As to the said lamp-black fuel, however, the evidence shows that the said fuel was fuel of the same character, and even better than the lamp-black fuel which had been furnished to the defendant by the plaintiff's assignor for two years prior to July 12th, 1909; that it was lamp-black fuel possessing all of the qualities which the parties contemplated that it should possess at the time the said contract of July 12th, 1909, was entered into, and that said lamp-black fuel had as great a tensile strength and solidity as was possible for the same to possess.

The evidence further shows that in manufacturing the lamp-black fuel furnished to the defendant during the final test of its said apparatus the plaintiff used the most modern processes, and that it was the only concern in the United States producing lamp-black fuel of the character herein referred to; that prior to the final test of said apparatus, the defendant notified the plaintiff that the fuel which the plaintiff later supplied to the defendant was satisfactory to the defendant in every respect for the final test of said apparatus. The evidence shows that the defendant was aware at all times of the fuel which the plaintiff intended to furnish to it during said final test, and had examined and tested the same and reported that it was satisfactory; that the de-

fendant at no time complained of the tensile strength of the fuel furnished to it during said final test, except from about the 20th of March, 1910, until the end of said test.

The evidence further shows that during the said final test the plaintiff furnished to the defendant the best possible fuel in its possession, and the only fuel which was possible for plaintiff to obtain or manufacture; and that all of the fuel furnished to the defendant during said final test was fuel having the tensile strength and solidity, and every other quality and characteristic provided for under the contract of July 12th, 1909.

ANALYTICAL INDEX TO BRIEF OF THE ARGUMENT.

BRIEF OF THE ARGUMENT.

I.

The court erred in finding that the lamp-black fuel furnished by the plaintiff during the final test of the apparatus was not in accordance with the contract requirements, the said finding being unsupported by the evidence and being a decision against law.

(1) As to This Finding Being Unsupported by the Evidence.

The foregoing finding of the court is the pivotal point in the case and practically all the other findings objected to by appellant are dependent thereon, and must fall, if the finding of the court in regard to the fuel was erroneous.

The court expressly found that during the final test of the defendant's apparatus from the 10th to the 30th of March, 1910, the apparatus failed to make the minimum quantity of gas specified in the contract of July 12, 1909, and that the apparatus failed to produce gas of the character and with the fuel economies specified and required under the terms of said contract. [Tr. p. 778.] So that if the plaintiff performed its obligations under the contract it was entitled to judgment.

The court further finds that the plaintiff in all particulars did fully perform all the conditions imposed upon it under said contract, with the one exception, to-wit: That the lamp-black fuel furnished by the plaintiff to the defendant during the final test of said apparatus did not have a certain quality, that is, a tensile strength equal to that which the court believed the fuel, with which the plaintiff was obliged to supply the de-

fendant under the terms of the contract, should have. [Tr. pp. 782-783.] This adverse finding is based entirely upon an alleged oral representation made by the gas company to defendant's representative more than two years prior to the time of the execution of the contract in suit, the said representation forming a part, of the negotiations preceding and leading up to an earlier and different contract entered into between the parties in April, 1907. Plaintiff claims that said representation, if made in 1907, did not as a matter of fact, and cannot as a matter of law, form a part of the contract in issue, dated July 12, 1909.

As related to this finding, the court necessarily found that by reason of this alleged failure to supply the right quality of fuel, a final test of the apparatus, such as was contemplated by the contract, was never had. [Tr. p. 785.]

Defendant's contention that a guarantee of the form and quality of the lamp-black was a part of the contract of July 12, 1909, is based on the one fact that in March, 1907, plaintiff's agent gave defendant's representative a small lamp-black briquette and stated that the fuel which would be furnished would be of "like quality," but in a different shape. [Tr. p. 408.] Defendant claims that this briquette had great tensile strength and that inasmuch as the lamp-black fuel furnished defendant during the final test under the contract of 1909, did not have an equal tensile strength, that plaintiff failed to perform the contract in this regard, that no final test under the contract was had and that defendant is not responsible for the failure of the apparatus. It is evi-

dent, on the other hand, that if the plaintiff did furnish the defendant during the final test of said apparatus with a lamp-black fuel answering the description of that called for by the contract of July 12, 1909, then the test of the apparatus *was* the final test required by the contract, and the court having found that the apparatus failed, during said test, to make the minimum quantity of gas called for by the contract with the fuel economies therein specified, the judgment of the court for the defendant must be reversed.

The contract involved in this suit was a written contract entered into between the plaintiff's assignor, the Los Angeles Gas and Electric Company, and the defendant on the 12th day of July, 1909. For the convenience of Your Honors we insert it here in full:

"This agreement, made and entered into this 12th day of July, 1909, by and between the Western Gas Construction Company, a corporation of Fort Wayne, Indiana, party of the first part, and the Los Angeles Gas and Electric Company, a corporation of Los Angeles, California, party of the second part,

Witnesseth: Whereas, the parties hereto did on the 8th day of April, 1907, enter into a contract by which the party of the first part herein, agreed to furnish and install at the plant of the party of the second part an Extended Carburetter Superheater Water Gas Apparatus, and

Whereas, the said party of the first part did furnish and install at the plant of the party of the second part, an Extended Carburetter Superheater Water Gas Apparatus, and the party of the second part did pay the

party of the first part a portion of the contract purchase price therefor, to-wit: Twenty-six thousand eight hundred twenty-three and 45/100 ($26,823.45) dollars, and

Whereas, litigation has arisen between the said parties hereto concerning the question as to whether or not the said Extended Carburetter Superheater Water Gas Apparatus furnished and installed by the party of the first part as aforesaid, was in accordance with said contract, and whether or not the said apparatus so furnished and installed, could produce the amount of gas guaranteed in said contract, and

Whereas, the parties hereto now desire to finally dispose of and settle the controversy which has arisen between them concerning said apparatus.

Now, therefore, be it agreed:

1. That the party of the first part will at once proceed, and with as much expedition as possible make such changes in said apparatus as it may desire for a preliminary experiment with said apparatus for the determination of the character of changes or alterations it may desire to make preparatory to a final test of said apparatus; that the said party of the first part will immediately after said preliminary experiment, and with as much expedition as possible, make such changes in said apparatus as it may desire for the final test, which changes shall in part consist of:

1st. A new generator or generators, in place of the present generator now a part of said set.

2nd. Provide ample means for the collection and easy removal of dust and fine carbon carried from the generator to the carburetter.

3rd. Provide ample and satisfactory means for scrubbing and condensing of gas made.

And that after said changes are made said party of the first part shall at once proceed to make gas with said set, of the kind specified in said contract, with the same economy of fuel and oil mentioned in said contract.

2. It is agreed that if in said test said party of the first part shall bring said apparatus to a gas making capacity of two million (2,000,000) cubic feet per twenty-four (24) hours, of the kind of gas mentioned in said contract, with the same economy of lamp-black fuel, containing not more than ten (10%) per cent moisture, and oil mentioned in said contract, then the party of the first part will accept as full payment for said apparatus twenty-six thousand ($26,000.00) dollars, and in making this payment, twenty-six thousand ($26,000.00) dollars of the sum of twenty-six thousand eight hundred twenty-three and 45/100 ($26,823.45) dollars already paid by the party of the second part, to party of the first part, shall be deemed as the payment hereunder, the balance of said sum, to-wit, eight hundred twenty-three and 45/100 ($823.45) dollars, to be returned by said first party to party of the second part.

If the party of the first part shall, in said test, bring said apparatus to the capacity of two million seven hundred and fifty thousand (2,750,000) cubic feet per twenty-four (24) hours of the kind of gas specified in said contract, with the same economy of lamp-black fuel, containing not more than ten (10%) per cent moisture, and oil mentioned in said contract, then the party of the first part will accept as full payment for

said apparatus the original contract price, to-wit, thirty-five thousand six hundred ninety-four ($35,694.00) dollars, the payment of twenty-six thousand eight hundred twenty-three and 45/100 ($26,823.45) dollars already made by party of the second part to be applied on the payment aforesaid.

And it is agreed that if said party of the second part shall during said test, bring said apparatus to a gas making capacity between two million (2,000,000) cubic feet per twenty-four (24) hours and two million seven hundred and fifty thousand (2,750,000) cubic feet per twenty-four (24) hours, of the kind of gas mentioned in said contract, with the same economy of lamp-black fuel, containing not more than ten (10%) per cent moisture, and oil mentioned in said contract, said party of the second part will pay for said apparatus for each fifty thousand (50,000) cubic feet of gas per twenty-four (24) hours capacity over and above two million (2,000,000) cubic feet per twenty-four (24) hours, a sum proportionate between the said sum of twenty-six thousand ($26,000.00) dollars herein agreed to be paid for said two million (2,000,000) cubic feet capacity per twenty-four (24) hours, and the sum of thirty-five thousand six hundred and ninety-four ($35,694.00) dollars, for said two million seven hundred and fifty thousand (2,750,000) cubic feet capacity per twenty-four (24) hours, and in making any of the aforesaid payments, the amount of twenty-six thousand eight hundred twenty-three and 45/100 ($26,823.45) dollars already paid by the party of the second part shall be applied on the payment thereunder.

And it is agreed that the capacity of said apparatus shall be determined solely as follows: The party of the first part shall notify the party of the second part when it is ready for the final test of said apparatus, and the average capacity per twenty-four (24) hours of said set during said test, which shall not be less than twenty (20) consecutive days, shall constitute the capacity of said apparatus for all the purposes hereunder.

3. And the party of the first part agrees that if said party of the first part cannot, during said test, bring said apparatus to an established capacity as herein defined, of at least two million (2,000,000) cubic feet per twenty-four (24) hours, of the kind of gas specified in said contract, with the same economy of oil and lamp-black fuel containing not more than ten (10%) per cent of moisture mentioned in said contract, said party of the first part will remove at once without any cost to the party of the second part, said apparatus from the premises of the party of the second part, and repay to said party of the second part all money heretofore paid or advanced by said party of the second part to said party of the first part under said contract, to-wit: Twenty-six thousand eight hundred twenty-three and 45/100 ($26,823.45) dollars.

In witness whereof, the parties have hereunto affixed their hands and the seals by their agents duly authorized.

THE WESTERN GAS CONSTRUCTION COMPANY.
By B. S. PEDERSON, *Agent.*
LOS ANGELES GAS AND ELECTRIC COMPANY.
By T. P. MCCREA, *Purchasing Agent.*
Approved as to form.
WM. A. CHENEY, *General Counsel.*"

(a) *Contemporaneous construction of the contract by the parties.*

It will be noticed from reading this contract that the only mention therein of the character of the lamp-black fuel to be used in the apparatus is that the fuel shall be lamp-black "containing not more than ten (10%) per cent moisture." The court will notice that nowhere in this contract is there any requirement that the lamp-black fuel shall be *bricked* or furnished to the defendant in any specific form or manner, or shall possess any degree of hardness or tensile strength.

The contract of July 12, 1909, by its terms refers to a prior and absolutely independent contract which was entered into between the same parties in April, 1907 [Tr. p. 9], but the reference made to that contract is in regard only to the quantity of lamp-black fuel and oil with which the defendant agreed, in the contract of 1907, to produce a thousand feet of gas, to-wit: 35 pounds of lamp-black and four and a half gallons of crude oil. As recited in the contract of July 12, 1909, the parties to the contract of 1907 had a serious disagreement as to whether or not the apparatus which the defendant had installed at the gas company's plant had proven to be in accordance with the requirements of the contract of 1907. The parties therefore entered into the contract of 1909, which is by its terms entirely independent and in substitution of the contract of 1907. The contract of 1907 thereupon became abrogated and none of its provisions form any part of the contract of 1909. The only use that is made of the contract of 1907 is, as we have said, that the contract of 1909 re-

fers to it for the sole and only purpose of showing the "quantity" of lamp-black fuel and of oil which the defendant was entitled to use in producing a thousand feet of gas.

If, therefore, the term lamp-black fuel, contained in the contract of 1909, is uncertain or ambiguous as to its meaning, it is of course allowable for the court to inquire into the conduct or situation of the parties to the contract *at the time* the contract of July, 1909, was entered into. The provision of law which enables the court to construe a contract by taking into consideration facts in addition to those set forth in the contract itself, necessarily limits the court's inquiry to the actions and situation of the parties to the contract at the time the contract was entered into, or, at most, immediately prior thereto.

In *Baldwin v. Napa etc. Wine Co.,* 1 Cal. App. 215, 218, the court says:

> "The contemporaneous and practical construction of a contract by the parties, is strong evidence of the meaning of equivocal terms."

In the case of *Leschen & Sons Rope Co. v. Mayflower etc. Co.,* 173 Fed. 855, the court said:

> "The purpose of all interpretation is to ascertain and give effect to the intentions of the parties expressed by their writings. The basic rule for the discovery of those intentions is that the court, so far as possible, should put itself in the place of the parties to the contract when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, of its purpose and of the circumstances which conditioned its making, endeavor to ascertain what they intended to agree

to, upon what sense and meaning of the terms they used their minds actually met." (Citing cases.)

"The construction which the parties give to a contract prevails where the language used will reasonably allow such construction."

Kennedy v. Lee, 147 Cal. 606.

In *Manhattan Life Ins. Co. v. Wright,* 126 Fed. 87, the court said:

"The practical interpretation given to their contracts by the parties to them, while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not like to commit serious error."

The rule was expressed as follows in *Moore v. Beiseker et al.,* 147 Fed. 367, 77 C. C. A. 545, cited with approval in *Texas Star Flour Mills Co. v. Moore,* 177 Fed. 751:

"There has never been any rule of construction of contracts more instinct with the spirit of justice and practical sense than that which declares that, where the provisions of a contract become the subject of controversy between the parties, the practical interpretation placed thereon by their acts, conduct, and declarations is of controlling force. This for the reason that the interest of each leads him to a construction most favorable to himself, and, when differences have become serious and beyond amicable adjustment, it is the better arbiter."

So it was said in *Long-Bell Lumber Company v. Stump,* 86 Fed. 578, 30 C. C. A. 264:

"Courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine

> the construction which should be put upon the contract in enforcing the rights of the parties. The most satisfactory test of ascertaining the true meaning of a contract is by putting ourselves 'in the place of the contracting parties when it was made, and then considering, in view of all the facts and circumstances surrounding them at the time it was made, what the parties intended by the terms of their agreement.' And when this intention is made clear by the course of their subsequent dealing and action thereon, it must prevail in the interpretation of the instrument, regardless of inapt expressions or careless recitations."

Seeking an interpretation of the meaning of the parties by the term "lamp-black fuel," we will view the situation and conduct of the parties to the contract at the time the contract was entered into, and thereby arrive at a correct understanding of what was in the minds of the parties at that time.

We find the gas company engaged in the manufacture of commercial gas from crude oil, by which process a by-product is derived, which is known in the gas-making world as lamp-black. [Tr. p. 397.] The gas company was accustomed to take this lamp-black as it came from the generators, combined with a large amount of water, conduct it into settling pits (where the water was evaporated, leaving the lamp-black settled in the bottom of the pits), thence to dig it out in large lumps and feed it into the gas making generators in the rough lump form [Tr. pp. 474-5, also pp. 195-197], or else the lamp-black was taken to a machine known as a Cummer dryer, where it was subjected to a process of drying to a degree of moisture content not exceeding from fifteen (15%) to twenty (20%) per cent, in which state it was

taken to a machine and pressed into the form of ordinary building bricks, and in this brick form used in the gas making generators.

The evidence shows that the gas corporation was the only concern known that converted its lamp-black into this brick form [Tr. p. 479], and no one testified during the trial to have ever seen lamp-black bricks thus commercially made in any other place in the United States [Tr. p. 508], or made in any manner different from that adopted by the gas corporation. In other words, the gas corporation was the originator of this form of fuel for gas making. The uncontroverted evidence shows that the gas corporation was in the possession of the best process obtainable for the purpose of converting its crude lamp-black into the form of bricks. [Tr. pp. 690-692.] The witnesses for the gas corporation testified that they had from time to time placed orders for the strongest and most efficient presses that the manufacturers could produce. [Tr. p. 691.]

At the time the contract of July 12, 1909, was entered into, the construction company had had two years experience at the gas company's plant with the character of lamp-black bricks which the gas company was manufacturing, and had used thousands of tons of the same in various tests which the construction company had conducted with the water gas apparatus that it had installed at the gas company's plant under the contract of 1907. There was no evidence introduced to show that the gas company at any time subsequent to July 12, 1909, pursued any method of lamp-black brick manufacture different in any manner whatever from

the methods it had pursued during the two years prior thereto, nor any evidence that the brick lamp-black fuel which was furnished to the defendant during the final test of its apparatus in March, 1910, was manufactured in any manner whatsoever different from the method of manufacture pursued by the gas company at all times prior to July 12, 1909. In other words, the bricks furnished the defendant in the final test were bricks manufactured in the identical manner with the bricks with which the defendant was at all times familiar prior to and at the time of the execution of the contract of July, 1909. [Tr. pp. 688, 689.]

Since the contract of July 12th, 1909, is silent as to the form in which the gas company was obligated to supply the lamp-black fuel to the defendant, if the court should believe that it was not optional with the gas company to supply this fuel in any commercial form, the court can only construe the contract as requiring that kind of lamp-black fuel which was in the *minds* of the parties to the contract and which was being used *at the time of its execution.* The court certainly will not hold that the parties *silently* contemplated that a character of fuel would be furnished which it was impossible to manufacture and which would possess characteristics which they had never seen before. The evidence shows that at the time the negotiations were being had between the parties relating to and culminating in the execution of the contract of July 12, 1909, that absolutely no mention was made by either party as to the form in which the lamp-black fuel should be supplied to the defendant by the gas company. [Tr. p. 195.]

The only witness who even attempted to state what the conversation was, if any, that took place between the parties in the negotiations leading to the execution of the contract of July 12th, 1909, concerning fuel, was the testimony of the plaintiff's purchasing agent, Mr. Luckenbach, who stated that, while there was considerable discussion between the parties concerning the fuel which had theretofore been supplied to the defendant, the only complaint made by the defendant, and the only point under discussion was its moisture content. [Tr. p. 195.] There is absolutely, as we have heretofore stated, no evidence of any agreement or understanding between the parties at the time the contract of 1909 was entered into, regarding the form in which the lamp-black fuel should be supplied, and we therefore submit that the only evidence to which the court can look in its endeavors to gain additional information as to the meaning of the term lamp-black fuel, should it believe that such additional information is necessary, is to consider what was the character of the lamp-black fuel which the parties were using at the time this contract of July 12, 1909, was entered into, and immediately theretofore.

That the fuel furnished the defendant in the final test of its apparatus was equal to the fuel on hand and in use in July, 1909, is shown by the testimony of the plaintiff's witnesses to the effect that the fuel furnished the defendant during the final test of the apparatus was the best lamp-black brick ever manufactured by the gas company. [Tr. pp. 694, 732, 644.] In fact, part of it was the same identical lot of fuel. [Tr. pp. 687, 688.]

Opposing this statement of the plaintiff's witnesses is the testimony of the defendant's two operators (who had failed to make good), who stated merely that the lamp-black bricks furnished to the defendant during the final test were not as good as some bricks which were supplied to the defendant for a preliminary trial of the apparatus (we call the court's attention to the time) *in January and February,* 1910 [Tr. pp. 566, 527], but the defendant introduced absolutely no evidence to show that the lamp-black bricks furnished during the final test in March, 1910, were inferior or different in any respect from the lamp-black bricks with which the defendant was familiar in July, 1909, or different from the lamp-black bricks which the defendant had at all times theretofore received from the gas company and used during its operations at the gas company's plant. Such a comparison is the only one that can have any weight in this case.

If, therefore, the determination of the question as to whether or not the fuel supplied by the gas company during the final test was such fuel as called for by the contract rests upon the practical and contemporaneous construction of the parties;—that is, upon a comparison of the fuel furnished during the test with the fuel with which the parties were familiar *at the time* the contract of 1909 was entered into, as it necessarily must, then the finding of the court herein objected to must fall, because there is absolutely no evidence to sustain the court's finding, and it is directly contrary to the uncontroverted evidence introduced on the part of the plaintiff to the effect that the fuel furnished in March,

1910, was equal to and even superior to that manufactured by the gas company and used by the defendant *at all times prior to July,* 1909.

(b) *Estoppel of defendant's objection to the lamp-black fuel furnished by the gas company during the final test of the apparatus.*

We desire briefly to outline the history of the particular lot of fuel supplied by the gas corporation to the defendant for the final test of its apparatus in March, 1910. The estimated consumption of lamp-black fuel for this final test, as given to the gas corporation by the defendant, was three thousand (3000) tons for the twenty (20) days during which the test would last. [Tr. p. 198; exhibit 9.] The gas corporation's capacity for producing lamp-black bricks was not more than thirty (30) tons per day [Tr. p. 241], and as it was required under the terms of the contract that all of the lamp-black fuel supplied during the test should have a moisture content not exceeding ten (10%) per cent, it was necessary for the gas company to commence to store up a sufficient quantity of lamp-black fuel for this final test many months in advance of the test, for two reasons: First, in order that a sufficient quantity of fuel might be on hand; and second, that the fuel might have a chance to become sufficiently dry to meet the requirements of the contract.

Under the contract of July, 1909, the construction company was given the right forthwith to institute a preliminary test of its apparatus in order to determine what character of changes or additions it desired to make to prepare the apparatus for a final test. It was

optional with the defendant how long it should conduct this preliminary test, and it was optional with it how long it should take in making its changes and additions, so that the gas corporation was not able to foresee with any degree of certainty when it would be called upon to supply the defendant with 3000 tons of fuel for the final test. In order not to be caught napping at the time when the defendant should conclude to carry out its final test, the gas company commenced the preparation of the fuel to be used in the final test as early as July, 1909. [Tr. p. 375.] At this time, there was on hand a considerable quantity of lamp-black bricks [Tr. pp. 355-356], a large portion of which had been kiln dried and had formed a portion of a quantity of bricks which the gas company had been previously furnishing to the defendant in the tests and operation of its apparatus under the contract of 1907, and which the defendant had at that time stamped with its approval. [Tr. pp. 191, 687.]

The gas company added to the bricks which it had on hand on July 12, 1909, enough bricks to bring the total quantity to three thousand (3000) tons, and this quantity of bricks was, to the knowledge of the defendant, expressly set aside for use in the final test of its apparatus. And the defendant's operators and its Pacific Coast agent, Mr. Pederson, saw these bricks from time to time and in December, 1909, Mr. Pederson wrote the following letter to the gas company, dated December 28, 1909 [plaintiff's exhibit No. 15, Tr. vol. 1, p. 207]:

"Mr. C. A. Luckenbach, Manager of Construction, Los Angeles Gas & Electric Corporation, Los Angeles, Cal.

Dear Sir: In confirmation of our conversation this morning, I beg to state that we desire to withdraw our letter of December 13th in reference to the fuel to be used during the test of the water-gas apparatus now being installed by us. *The fuel that you have on hand at present will be satisfactory,* but we feel that it must be protected from additional moisture, and would ask that you protect the fuel that you have ready for us from rain and other moisture that may be precipitated upon it.

Yours respectfully,
THE WESTERN GAS CONSTRUCTION COMPANY.
By B. S. PEDERSON, *Agt.*"

Mr. Luckenbach, the gas corporation's manager of construction, stated that upon the receipt of this letter he "gave instructions immediately to have it" (the fuel) "fully covered with tarpaulin, galvanized iron or other material that might be necessary to keep it from exposure to rain." [Tr. p. 209.]

The plaintiff's witnesses testified that this fuel was immediately covered, as requested by the defendant, and kept so covered up until the time of the final test, and that every precaution possible was taken to prevent the fuel coming in contact with the rain or any moisture [Tr. 355-356], and there was no evidence introduced denying this or showing that the gas company was in any respect negligent or lax in the care of this fuel.

The evidence shows that in the spring of 1910 the

rainfall was excessive, and that while none of this fuel came in direct contact with the rain, yet lamp-black bricks will absorb a certain percentage of moisture from the surrounding air. [Tr. p. 356.] These bricks were gone over and tested by plaintiff regularly prior to the final test. [Tr. p. 357.] The plaintiff showed that as early as December, 1909, practically every bit of these three thousand (3,000) tons of lamp-black bricks was reduced to a moisture content of less than ten (10%) per cent, but owing to the absorptive characteristics of lamp-black bricks, they did absorb some additional moisture, so that by the latter part of February, 1910, the average moisture content of the bricks was between fifteen (15%) and twenty (20%) per cent. [Tr. p. 356.] The gas company then subjected the bricks to the only known process for reducing the moisture content, namely, to a process of kiln drying, which was done by re-piling all of these bricks, at a large expense (exceeding fifteen hundred [$1500.00] dollars for labor), and building fires under them and thereby reducing their moisture content to the contract requirements. [Tr. pp. 707-708.]

The evidence shows that the gas corporation was so desirous of furnishing the defendants with a fuel complying in every respect with the contract that it employed a chemist whose sole duty was to test every pile of bricks in its yard in order absolutely to determine that every brick delivered to the defendant had a moisture content of less than ten (10%) per cent [Tr. 310-322], and the defendant admits, and the court found, that all of the fuel supplied to the defendant conformed to the contract in this respect.

This process of kiln-drying the bricks took from two to three weeks. The defendant's operators in charge of their apparatus admitted that they had knowledge of the fact that the gas company was resorting to the process of kiln-drying in order to reduce the bricks to the proper moisture content [Tr. 426, 441], yet defendant did not testify that at any time it made the slightest objection to this practice on the part of the gas company [Tr. 509], neither did it suggest any plan or method other than this, whereby the gas corporation could have reduced this fuel to the proper moisture content required by the contract, and it was not until the 18th day of March, 1910, or nearly at the middle of the final test, that the construction company ever intimated, either in writing or orally, that it was in the slightest degree dissatisfied with the lamp-black fuel which was being furnished to it during the final test. [Tr. p. 223.] At the time the defendant made the complaint to the plaintiff, in the midst of the test, that the fuel was brittle and did not have as great a tensile strength as the defendant then desired, the gas company did not have in its possession any lamp-black bricks better than, or different in any respect from, those being supplied to the defendant [Tr. 509], and the uncontroverted evidence in the case (to which we will later refer specifically) was that it was physically impossible for the gas corporation or for anyone else to have manufactured, or to have supplied the defendant during the final test of its apparatus with lamp-black bricks having a tensile strength or any property or characteristic different from or superior to those

possessed by the bricks supplied to the defendant during the final test, which the defendant had specifically passed upon in December, 1909, as satisfactory [Tr. 207], which it had used in January and February, 1910, and made no complaint about, and which apparently were at all times satisfactory to it until in the very middle of its final test, when it found that the apparatus was making an absolute failure and that it would not be able to produce either the minimum quantity of gas provided for in the contract or comply with the fuel economy specified. It is too plain to require argument, that the only reason why the defendant made this eleventh hour complaint against the character of the fuel was to lay some foundation for resisting a law suit which would ultimately follow the failure to comply with the terms of its contract.

When this complaint was, for the first time, made it was impossible, as the construction company knew, to furnish any other bricks. These bricks had been specially prepared, set aside, inspected and approved, were used in the preliminary tests and were being used in the final test then under way. They had been manufactured and cared for by the gas corporation in reliance upon the construction company's assurance that they were satisfactory. After the final test commenced and some of these brick had been delivered and used the construction company was estopped from denying that they conformed to the contract.

"Where the buyer of railroad ties, knowing that the seller is buying and paying for ties for delivery, receives and inspects those delivered and makes a written

report to the seller, showing their acceptance, and thereby induces the seller to believe that like ties will be accepted, under a written contract, and they are shipped by the seller under that belief, the buyer is estopped from denying that the ties conform to the contract."

Richardson et al. v. Herbert, 135 S. W. 628.

(*c*) *A provision in a contract should be construed so as to make its operation possible.*

The evidence and the findings of the court show that the gas company desired to acquire a water-gas apparatus of the kind which the defendant contracted to install in order to enable the gas company to use its lamp-black by-product. [Tr. p. 770.]

At the time the contract of July 12, 1909, was entered into, the defendant had had two years' experience in handling the lamp-black bricks manufactured by the gas company, and the gas company knew from experience the character of the lamp-black bricks which it was possible for it to manufacture. It could not, therefore, have been contemplated by the parties (especially when they made no written or oral expression on the subject) that under the terms of the contract the gas company was obligated to supply the defendant with a quality of fuel superior to that which it was commercially possible to manufacture and a quality of fuel superior and different from that which the gas company had ever theretofore manufactured. In other words, the contract must be construed in the light of reason, and if the evidence shows that the fuel which

was furnished the defendant during the final test of its apparatus from the 10th to the 30th of March, 1910, was the best fuel which it was possible for the gas corporation to manufacture, and was fuel equal, if not superior, to any with which the defendant was familiar *at the time* the contract of July 12, 1909, was entered into, then we submit that it is manifest that the court should not construe into the contract of 1909 an impossible requirement or provision. It is not material or pertinent that defendant's two operators testify that the fuel was not as good as a small quantity delivered them for a preliminary run, *after the execution of the contract.*

J. J. McDonald, one of the plaintiff's witnesses, testified in rebuttal [Tr. p. 644] that he had had about six years' experience in the manufacture of gas from lamp-black and that he was one of the operators who, under the direction of the defendant's engineers, ran the defendant's water-gas apparatus during its final test in March, 1910, and when questioned regarding the comparative qualities of the lamp-black fuel supplied the defendant at this time, testified as follows:

"Q. How did the bricks that were actually used in this gas-set during the test compare with the bricks that you were accustomed to use in your sets or the sets belonging to the gas company as to hardness and as to their keeping their form while being handled in the generator?

A. These bricks are the best bricks that I ever handled in my experience in a water-gas set. The brick handled there were the best bricks I have used

in my experience with the Los Angeles Gas Corporation.

Q. When you say "best," you mean the best in what respect?

A. They were dry brick, and solid."

The gas corporation's assistant superintendent of gas manufacture, Mr. John Creighton, testified in rebuttal as follows:

"Q. Did you observe the bricks that were used by the Western Gas Construction Company during its final test as to their density or tensile strength and their behavior under handling?

A. Yes, sir.

Q. State whether or not those brick were different in that respect or either of those respects from the common run of bricks that were commonly used in your water-gas set.

A. It was commonly known that it was as good or better brick than we ever used or ever tried to use, and the trouble that we went to to get those bricks and have them fall below that moisture—it was better brick than we had ever used.

Q. Did you ever make or see made at the Los Angeles Gas and Electric Corporation's works any better or more substantial bricks than these from which the bricks used in this set were taken?

A. No, sir.

Q. From your experience in the operation of bricking-presses in the manufacture of carbon brick, will you state whether or not it is practicable or possible to make any better or stronger brick than these were?

A. It is not." [Tr. p. 694.]

Mr. D. J. Young, the plaintiff's superintendent of gas manufacture, testified concerning the fuel furnished the defendant as follows:

"Q. How did the brick furnished to this set during this test compare with the average run of brick that you used in your own water-gas set?

A. They compared very favorably. That is, these bricks are as good or better than our ordinary bricks.

Q. How did they compare in tensile strength and cohesiveness and ability to retain their shape?

A. I think the brick furnished them were a little better in that respect. The bricks that we ordinarily used were not as well dried as those bricks are." [Tr. p. 732.]

The court can, if it desires, ascertain from reading the testimony of these three witnesses, set forth in full in the transcript, that these men are absolutely the best authority in the world upon the subject of the manufacture of bricks from lamp-black, for, as stated by witness Creighton, they "had had all the experience there was on the subject." As opposed to the testimony of these three men, the only testimony introduced by the defendant which compared the tensile strength of the bricks furnished the defendant during the final test with any bricks with which the defendant had theretofore been familiar was the statement of their engineer, Mr. Pederson, and their operator, Mr. White, who stated that the bricks furnished during the final test were not in as good a condition or shape or could not stand handling as well as some bricks which had

been furnished to the defendant by the gas company for experimental purposes *during the preliminary test* SUBSEQUENT *to the 12th of July,* 1909 [Tr. pp. 527, 566], but neither Pederson nor any other witness testified that the bricks furnished or supplied were in any respect inferior to the bricks furnished to the defendant *prior* to July 12, 1909.

When questioned by the court as follows:

"To what cause or causes do you ascribe the failure of your test to even approximately reach in production the capacity to which you testify?"

Pederson replied:

"A. Entirely to the difference of the fuel that was provided for the generator." [Tr. 525 and 526.]

"Q. (By the Court.) I will ask you one question: To what process could the lamp-black furnished by plaintiff for the test made between March 10th and March 30th, 1910, have been subjected to, so as to make bricks suitable for use in this apparatus of that set?

A. The lamp-black should have been dried, as we expected it to be, down to below 10 per cent, and then pressed in a brick and solid brick. The lamp-black brick furnished us, by reason of the large amount of moisture at the time they were made, became, when the moisture was driven out, a porous, spongy mass.

Q. You claim that the lamp-black should have been brought to the desired degree of moisture before it was made in the form of bricks.

A. That is the idea.

Q. The imperfect process of which you complained is that the lamp-black was not dried or brought down

to the proper degree of moisture before being pressed into the form of brick; is that the idea?

A. Yes, sir." [Tr. 528 and 529.]

Mr. Pederson was the Pacific Coast representative of the defendant company and was the agent who entered into the contract in suit on behalf of the defendant and was the chief engineer in charge of the defendant's apparatus during its various tests at the gas company's plant, and in the above answers given to the questions of the court, Pederson sets forth the sole and only objection advanced by the defendant during the trial of the case as to the reason why their set made such a miserable failure, and the above statement of Mr. Pederson shows definitely the only objection that they had to the fuel furnished by the plaintiff was that the lamp-black was not dried to a moisture content of less than 10% *prior to its being bricked,* for he states, had the fuel been so treated, it would have been satisfactory and the test would have been more successful.

Having pinned the defendant down to this one position, we are able to demonstrate absolutely from the evidence the unsoundness of its position in this regard, for the following reasons:

The evidence shows without question:

1. That it is physically impossible commercially to manufacture a brick from lamp-black previously dried to a moisture content of less than ten (10%) per cent.

2. That the gas corporation, to the knowledge of the defendant, never at any time, either prior to or subsequent to the execution of the contract of July 12,

1909, had manufactured any bricks from lamp-black which had first been reduced to a moisture content of less than ten (10%) per cent.

3. That the three thousand (3000) tons of lamp-black fuel which the defendant's chief engineer, Mr. Pederson, in December of 1909, examined and stated to the plaintiff in writing was fuel satisfactory to the defendant for the final test of its apparatus, was lamp-black fuel which had been bricked from lamp-black having a moisture content greater than ten (10%) per cent at the time it was placed in the molds.

Even the defendant admits that the gas corporation is the only known concern which is manufacturing lamp-black into the form of bricks, and therefore its experience in the manufacture of these bricks must necessarily be the best and only evidence that could be introduced as to what is commercially possible to be done in handling a substance of this character.

On being referred to a lamp-black brick which the defendant had produced in evidence as being a sample of the fuel furnished them during the final test, Mr. John T. Creighton, the gas corporation's assistant superintendent of gas manufacture, stated:

"A. That is the same class of brick we *first made* and are *making now* on the press that that was made.

Q. What kind of a press were those bricks—speaking of your experience with bricks—what kind of a press were they made in?

A. They were made in an ordinary brick press, a fire-brick press from one of the fire-brick manufacturers in this city. It was a press taken from one of those houses, I believe.

Q. When did you install such a press in your works?

A. I believe it was in 1903, somewhere along about that.

Q. How many such presses have you had?

A. That was the only type of that kind, with a two-mould press. We had another that was a four-mold press that we got in about 1906 or 1907, I think. That was a four-mould press, pretty much the same type. It might have been a little stronger press * * * and we tried for a long time to see how hard we could make them, and we found that we broke the presses all to pieces by *trying to make them hard out of dry stuff.* * * *

Q. Now, you have had some experience with the making of these bricks from loose carbon?

A. Yes, sir. I had pretty near all the experience there ever was on it from the first day they ever tried to make them until the present day.

Q. Do you know from experience what difference it makes in the manufacture of these bricks from the loose carbon what the moisture conditions of loose carbon are?

A. Yes, sir, I was two or three years finding that out.

Q. By what means in 1910, if by any means, did you dry the loose carbon before bricking it?

A. We used a Cummer drier, to dry the carbon down to whatever moisture is feasible to brick the brick.

Q. Well, the Cummer drier dried the carbon down to any percentage you desired?

A. Not satisfactorily, it would not. It will dry them dry, but not practically.

Q. Practically, how dry will the Cummer drier make the loose carbon?

A. About 15 to 20 per cent.

Q. (By the Court.) That is, leave 15 or 20 per cent moisture in them?

A. Yes, sir, leave 15 or 20 per cent in the carbon as it comes out. If you go below that, it may explode just like gunpowder. When it gets drier than that, down say 5 or 10 per cent, you can't notice the moisture to any great extent, and the moisture will vary so great below 15 per cent without observing it, that any time after it is below 15 per cent with the 1,000 or 1,200 degrees temperature surrounding it, it is just liable to explode like the gas does. It had done it twice in our experience in the test of the machine when it was first installed.

Q. Now, after drying the carbon to any given or different percentages of moisture, what has been your experience with reference to the feasibility of making brick from the loose carbon, the loose carbon itself having different degrees of moisture content? State how that affects the brick-making.

A. In the brick-making part of it, they were making brick lower than 15 per cent moisture, *but it breaks the presses. It busts the wheels and busts the dies. We had it break a four-inch shaft in two, two or three times, on the very press that made that brick* (brick introduced in evidence by the defendant), *trying to make it drier than* 15 *per cent moisture.* It would stall

the press. We had an eight-inch belt on it and put a twelve-inch belt on it and ran the press to its final capacity and it stripped the gears sometimes of the cogwheel. We then tried to see if we couldn't get a stronger press, and while we were doing that, we ran this press to its limit of 15 or 20 per cent moisture and tried to keep it that way so as not to break the press down. We always thought it would be better if we could make brick a little drier, and we gave the firm that makes these briquette presses an open order to make us a press that was strong enough and big enough, within reasonable limits—to make us a press that was strong enough to press this stuff to a lower degree of moisture than what we had theretofore been able to do.

Q. Did you get any other press?

A. Yes, I was just coming to that—to state about the press that we got and explain the experience we had with it. We got a press that was built enormously strong, and we tried to brick it at a lower percentage of moisture than 15 per cent, and we broke that all to pieces.

Q. By bricking it to a moisture lower than 15 per cent, you refer to the powdered material.

A. Yes, sir.

Q. State from the experience you have gained in the operation of these presses what is the least moisture content of powdered carbon before bricking that can be used successfully in the bricking press.

A. Between 15 and 20 per cent." [Tr. pp. 685 to 692.]

Mr. Creighton then went on to state in his testimony

[Tr. p. 693 *et seq.*] that the reasons why lamp-black containing less than 15 per cent of moisture can not be successfully bricked were: First, that if the lamp-black is too dry when it is dumped into the moulds, too large a quantity of air is contained between the dry particles of lamp-black, with the result that when the stamp of the machine is driven in the mould, the compressed air either offers such a resistance that the machine is broken or the air is so compressed inside the brick that when the brick is released from the mould, the air which has been pressed inside the brick expands, causing the brick to crack or break open, and thus not only were the attempts to manufacture bricks from a dry lamp-black impossible from a mechanical standpoint because of the breakage of the machines, but the brick made was itself not as strong or desirable. [Tr. p. 693 *et seq.*]

Mr. Creighton explains that the reason why the gas corporation endeavored to produce a brick from a dry lamp-black was not because they believed the final product would be a better brick, but because a large amount of money would be saved by producing a dry brick, for the reason that it would save the time and the large expense necessarily resulting from the handling of the wet brick in the process of either sun drying or kiln drying them in order to bring them to the proper moisture content, and further that the drying of the wet bricks necessitated the use of large areas of valuable land at the gas plant, which land could be used for other and valuable purposes, if a dry brick could have been produced. [Tr. 712, 713.]

Mr. Creighton's experience in this regard was confirmed by the testimony of his superior, Mr. D. B. Young, the gas corporation's superintendent of gas manufacture. That Mr. Young is an authority upon the subject of the bricking of lamp-black is apparent from the fact that the defendant in the cross-examination of Mr. Young upon the subject produced an article written by Mr. Young in one of the leading gas publications upon this very subject. Mr. Young testified concerning the possibility of making a brick from dry lamp-black as follows:

"Q. State what the different degrees or percentage of moisture in the loose material,—what effect it has upon the making of brick with that material.

A. With the brick machines that we use, *it is impossible to make bricks with material, say, of five to ten per cent.* We cannot get them to a hard and brick form—if we put more pressure on, the machine either breaks or stalls. With bricks made with fifteen or twenty, they retain their form in good shape and make good, satisfactory brick. Our average practice in making bricks is from twenty to twenty-five per cent moisture.

Q. You mean moisture in the loose material?

A. Yes, sir." [Tr. p. 733.]

As opposed to the testimony of Mr. Creighton and Mr. Young, the only witnesses who had any experience in the manufacture for commercial purposes of lamp-black in the form of bricks, the defendant offered the testimony of its chief engineer, Mr. Pederson, and the testimony of a professor in a small local college, Mr.

Chandler, and in order that the court may see the immateriality, irrelevance and absolute worthlessness of their testimony, we will quote the same in full. Mr. Pederson's entire testimony on this subject is as follows:

"Q. Have you ever seen material dried first and then bricked?

A. To ten per cent?

Q. Yes.

A. I have seen them to this extent: That I made brick myself on a little *hand-press* with lamp-black containing 4 per cent moisture, and made a fairly substantial brick, although not of the thickness of the bricks used here. That was because of the apparatus that I had to experiment with. It was just one of these little hand-presses that they have in a brick-yard. But the brick I considered was fairly substantial. With a power-press I would say there was no difficulty at all to make a brick with a less percentage of moisture. My observation and what I have learned from other sources, confirms me in that statement, and my general knowledge of the material." [Tr. pp. 427 and 428.]

We call the court's attention to the last clause of Mr. Pederson's testimony and then direct the court to other portions of Mr. Pederson's testimony where he has repeatedly stated that the only knowledge that he ever had upon the subject of bricking lamp-black was his knowledge gained at the plant of the Los Angeles Gas and Electric Corporation, and that the only bricks he ever saw made were bricks made there. [Tr. 479.] When cross-examined as to his above testimony, Pederson testified as follows:

"Q. Now, you speak of this hand press with which you made an experiment. What kind of a machine was it?

A. It was one of these little brick presses that they have in brick yards, I presume to test clays with or make forms.

Q. How large a brick does it make?

A. It makes a brick about the size of one of those bricks, but lamp-black being more compressible than clay, it only makes thin bricks about two inches in thickness.

Q. What length and breadth?

A. The same length and breadth, but it drives it down tighter.

Q. In your experiments you made a brick of the length and breadth of a common building brick, or about the length and breadth of these bricks here, but only—

A. About half the thickness. * * *

Q. Where did you get the lamp-black from which this brick was made?

A. I made that brick in San Jose.

Q. And the lamp-black came from what?

A. An oil machine operated at that point.

Q. The San Jose Gas Works?

A. Yes, sir.

Q. When you got the crude lamp-black, was it in powder form or brick form or lump form or in what shape?

A. The crude lamp-black. We took it—probably containing 60 per cent moisture, and we put it on a

pan and spread it out on a connection between the generator and carburetor to dry, and let it dry five or six hours, and took it off and tested it for moisture, and we took it right out to the press and poured it into the press.

Q. Did you make any tar or hydrocarbon determination of this sample of lamp-black?

A. No, sir.

Q. What pressure is exerted in this press that you made the sample in?

A. I can't say.

Q. Have you here with you any sample made in the same press with the same lamp-black, containing a larger percentage of moisture at the time it was compressed?

A. I don't think I have it here. I have samples, but not here.

Q. After you spread this carbon out and dried it, did you then pulverize it?

A. *We stirred it up and worked it into the mould.* I didn't use any mortar or anything like that to pulverize it in. I stirred it up and *filled the mould and packed it in the mould with* MY HAND.

Q. Did you make any tensile strength determination?

A. I have made no determination whatever. I took the brick just as it came out of the machine, and I wanted to determine for my own knowledge just what it would do.

Q. Have you seen any other lamp-black bricking machine operating except the one of the Los Angeles Gas and Electric Company's works?

A. Yes, sir.

Q. Where?

A. In San Francisco.

Q. Did you ever see a commercial brick machine?

A. Yes, sir.

Q. Is it a brick machine or a briquette machine?

A. It is a combination of both. It makes a briquette probably four inches in diameter, and it is a continuous process something like a sausage machine.

Q. Does it make brick also?

A. No, sir.

Q. *Then, the Los Angeles press is the only brick-making machine that you have ever seen in operation?*

A. *It is.*

Q. It is not true in the San Francisco machine nor the Los Angeles machine that the moulds are packed in by hand?

A. Not to my knowledge." [Tr. pp. 476-9.]

The testimony of the defendant's local college professor was as follows:

"Q. Have you made any other efforts to ascertain what would be the effect upon a brick of drying it out by the application of considerable heat?

A. Yes, sir, I made about a dozen bricks in a *small mould* drying the material out first. In one case I dried it to 24 per cent moisture, in another case to 4 per cent moisture, and another case to a little over 1 per cent, and another case to 5 per cent of moisture, and then moulded the material into briquettes.

Q. What did you find to be the effect of applying heat to it?

A. I found that the best results that I got were obtained from the material which contained one per cent and possibly four per cent. Those two were the best brick. I think the one containing one per cent moisture was the best, although the two were fairly good. But the one which contained the 5 per cent moisture had lost a good deal of its hydrocarbon or binder, and it was impossible to make a coherent brick of that material, with the greatest pressure I could put on it. The material that had 24 per cent moisture, as it appeared then was somewhat damp, and of course was softer than the other brick.

Q. Did it brick well?

A. It bricked well enough, yes, but it was soft.

* * *

Q. What size brick was it that you made?

A. It was about half the size of the briquette furnished by the company to the local customers.

Q. *What kind of a press did you make it in?*

A. *We had a cylinder and a plunger and a vise.*

Q. But you hadn't any experience with an actual commerical press, and as to the effect of different percentages of moisture in the loose carbon in the manufacture of brick in a commercial press.

A. *I have no experience, no, sir.*

Q. Was this two-inch brick that you made in the cylinder and plunger with one stroke of the compressor or one stroke of the plunger?

A. Yes, sir. The mould was something over twice as long as the brick made, and we filled it full, and then pressed it as hard as we could in the vise.

Q. By continued pressure—increasing the pressure from time to time.

A. Yes, sir. Turned it up as hard as we could turn it, and then shoved it out.

Q. That would be a pretty slow process of making brick, if you had to make them by the ton, wouldn't it?

A. *Yes, sir.*" [Tr. pp. 758 and 765.]

The court will note that in both the tests made by Mr. Pederson and the college professor, that the lamp-black used was handled in a chemical laboratory fashion, was powdered and pulverized by hand and then packed into the mould with the fingers. It is needless to say that such experiments as this prove nothing and can have no legal weight as against the testimony of the plaintiff's witnesses, Young and Creighton, for it does not bear any relation to the question of manufacturing bricks commercially on a large scale. The very reason assigned by the plaintiff's experts as to why a brick can not be made from a dry lamp-black, namely, because of the excessive amount of air which would get into the mould with the dry lamp-black, is a reason which would of course not apply to the case of manufacturing a carbon brick in a laboratory, where the experimenter is able through the process of packing the mould first with his fingers, to drive out from the lamp-black all the air which would otherwise have been confined between the particles of dry carbon. So absolutely worthless is the evidence of the two witnesses of the defendant in this regard that we believe the court will be compelled to find that there is *no evidence* in the case contrary to the evidence of the plaintiff's wit-

nesses to the effect that it was impossible *commercially* to have produced lamp-black in a brick form from the raw lamp-black material containing less than ten per cent of moisture, and, if this is so, then the defendant Pederson when he replied to the court that the only complaint he had to make of the gas company's fuel was that the bricks were made from a lamp-black containing more than ten per cent of moisture, was registering a complaint which is barren of any value whatever in this controversy, for the court will not construe the contract so as to require an impossibility.

But assuming that it was physically possible to manufacture lamp-black bricks from crude lamp-black containing less than ten per cent of moisture, still that fact does not mean that the parties to the contract of July 12, 1909, contemplated that bricks of such a character should be supplied to the defendant, for certainly at the time this contract was entered into the gas company had by reason of its many experiments come to the conclusion that the production of a brick from a lamp-black containing less than ten per cent moisture was a physical impossibility. Hence the idea that the fuel which would be supplied the defendant under the final test would be fuel which had been bricked from lamp-black containing less than ten per cent of moisture could not have been an idea existing within the mind of the plaintiff, and since there must be a meeting of the minds in order to constitute a contractual agreement between parties, it is evident that both parties to this contract of 1909 did not agree that the fuel should be bricked from a dry lamp-black. Furthermore, it is

evident that the defendant never expected that the fuel would be so bricked, for two reasons: First, the defendant had never seen a brick made from lamp-black which contained less than ten per cent of moisture. The thousands of tons of bricks which it had theretofore used at the plaintiff's plant had all been made from a moist lamp-black and the moisture of the brick reduced to less than ten per cent. by sun drying or kiln drying the brick. Secondly, the defendant specifically placed its stamp of approval upon the 3000 tons of fuel which the gas company had accumulated in the fall of 1909 [Tr. 207], knowing at the time of said approval that this fuel had been made from moist lamp-black and thereafter dried to the required moisture content.

These facts show that the contention advanced by the defendant's chief engineer for the first time upon the witness stand in this trial is entitled to no weight, and cannot give any support to the findings of the trial court.

2. As to This Finding Being Against Law.

We have devoted our argument thus far chiefly to the proposition that assuming that all the conversations and correspondence between the parties prior to the date of the old contract of April, 1907, could properly be considered in evidence, and could be treated as part of the new written contract of July 12th, 1909 (although not expressed therein), even then the evidence does not support the finding that the lamp-black fuel furnished to the defendant was not of the quality agreed to be supplied. We pass now to the statement

of certain propositions of law which we believe, and respectfully assert, were disregarded by the trial court and which conclusively show reversible error in the finding that the lamp-black fuel furnished by the plaintiff during the final test was not in accordance with the contract.

(*a*) *The contract of April,* 1907, *was entirely abrogated by and merged in the contract in suit, and therefore the latter contract of July* 12*th,* 1909, *is the only contract between the parties.*

"Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in the Roman law."

Harrison v. Polar Star Lodge, 116 Ill. 279.

To the same effect:

Herboth v. American Radiator Co., 123 S. W. 533.

"A question frequently presented for decision is to what extent does the later contract abrogate the earlier contract. If the later contract expressly abrogates the earlier contract, it abrogates it *in toto* unless some restriction is made in the later contract, preventing such total abrogation. * * * If the later contract between the parties covers the same subject-matter and has the same scope as the earlier contract, but is in whole or in part inconsistent therewith, the later contract abrogates the earlier contract *in toto* and is the only contract upon the subject between the parties."

Page on Contracts, § 1340, p. 2076.

"A subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two cannot stand together, rescinds, supersedes, and is substituted for the earlier contract, and becomes the only agreement of the parties on the subject. Clark, Cont., 612; Patmore v. Colburn, 1 Cromp., M. & R. 65, 71; Chrisman v. Hodges, 75 Mo. 413, 415; Renard v. Sampson, 12 N. Y. 561, 568; Stow v. Russell, 36 Ill. 18, 30; Harrison v. Polar Star Lodge, 116 Ill. 279, 287, 5 N. E. 543, 546; Howard v. Railroad Co., 1 Gill 311, 341; Paul v. Meservey, 58 Me. 419, 421."

Housekeeper Pub. Co. v. Swift, 97 Fed. 293.

(*b*) *Negotiations, representations or understandings, preceding and leading up to a former written contract, cannot be carried forward and deemed incorporated in a subsequent written contract covering the same subject-matter unless expressed therein.*

In *Texas Star Flour Mills Co. v. Moore,* 177 Fed. 751, the court said:

"I know of no recognized rule of law by which a "statement made respecting the quality of an article "offered for sale, where the offeree had declined to "accept the proposal, can be carried forward and at-"tached to a subsequent convention between the parties "evidenced in writing which does not mention such "former assurance as an integral part of the present "agreement. The law, I think, is to the contrary. Ben-"jamin on Sales, Sec. 610, succinctly states:

" 'that antecedent representations made by the vendor

" 'as an inducement to the buyer, but not forming part " 'of the contract when concluded, are not warranties.'

"See, also, 1 *Lawson on Rights & Remedies, Sec.* "212; *Ashcom v. Smith,* 2 *Pen. & W.* (*Pa.*) 211, 21 "*Am. Dec.* 437; *Iron Works v. U. S.,* 34 *Ct. Cl.* 174."

"In *Chrisman v. Hodges,* 75 Mo. 413, 415, this exact question was presented to the Supreme Court of Missouri by an attempt to show by oral testimony that it was not the intention of the parties by a subsequent inconsistent contract to substitute that agreement for an earlier one, and the court unanimously held that this would be to permit parol evidence to contradict the terms and to destroy the legal effect of the later written contract, and that such evidence could not be lawfully received. The only testimony which could establish the truth of the averments in this regard falls under the ban of the established rule so often announced and applied in this court, that 'no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms and prevented the complainant from reading it.' *Insurance Co. v. McMaster,* 87 Fed. 69-71, 30 C. C. A. 538-540; *Thompson v. Insurance Co.,* 104 U. S. 252, 259; *Insurance Co. v. Henderson,* 69 Fed. 762, 766, 768, 16 C. C. A. 390, 393, 395, 32 U. S. App. 536, 543, 547; *Green v. Railway Co.,* 35 C. C. A. 68, 92 Fed. 873, 877; *Laclede Fire-Brick Mfg. Co. v.*

Hartford Steam-Boiler Inspection & Insurance Co., 60 Fed. 351, 353, 358, 9 C. C. A. 1, 3, 8, 19 U. S. App. 510, 513, 520; *Insurance Co. v. Mowry,* 96 U. S. 544, 547; *Assurance v. Kryder,* 5 Ind. App. 430, 435, 31 N. E. 851; *Union Nat. Bank of Oshkosh v. German Ins. Co.,* 18 C. C. A. 203, 71 Fed. 473; *Insurance Co. v. Teter,* 136 Ind. 672, 673, 676, 36 N. E. 283; *Burt Canal Co. v. Pennsylvania Coal Co.,* 8 Wall. 276, 290; *Insurance Co. v. Lyman,* 15 Wall. 664; *Pearson v. Carson,* 69 Mo. 550; *Insurance Co. v. Neiberger,* 74 Mo. 167; *Lewis v. Insurance Co.,* 39 Conn. 100."

Housekeeper Pub. Co. v. Swift, 97 Fed. 293.

In the case of *Shull v. Ostrander,* 63 Barbour 130, the action was for fraud or breach of warranty on the sale of a horse. The parties had exchanged horses. The defendant represented his horse to be six years old, and sound, except a bad cold, and good to draw. She was found not to be as represented, and that trade was given up, and the plaintiff took both horses, and gave his note to the defendant for $100.00. No new representations were made when the last trade was completed, except the allegation of the defendant that the stiffness of the mare, complained of by the plaintiff, was from a cold, which she would get over in a few days. The jury, upon these facts, found a verdict for the plaintiff, for $40, and the defendant appealed.

The court says:

"The first contract was fully executed by the delivery to each party of the property to which he was entitled under the contract, and a new and independent agreement entered into in reference to the same prop-

erty. If the plaintiff was now suing for breach of warranty on the first sale it is quite likely he would be entitled to recover, as there is but little question but that the defendant warranted his horse; nor but that such warranty was broken. But it is not claimed that this action was brought for breach of warranty, or fraud in the first sale or exchange. We must inquire, therefore, whether there was fraud or warranty in the second sale. The second sale was made at the defendant's house, after the plaintiff had taken back the horse he received of the defendant, and informed the defendant that he thought the mare was stiff. The defendant said he thought not; after driving her he said he thought she was a little stiff, caused from cold, but thought it would pass off in a few days. The new bargain was then made, and the plaintiff took with him both horses, and gave the defendant his note for $100. Confining the negotiations of the parties to the time when the second bargain was made, there was nothing said by the defendant from which a warranty of the horse could be inferred, or an intention to warrant. The plaintiff's counsel, to get rid of this difficulty, insists that the defendant is liable for the representations made and the warranties given in the first sale, inasmuch as the plaintiff must be held to have made the second in view of, and in reference to, what had been said by the defendant on the first sale. That the second bargain was but a modification of the first, and not a new and independent agreement.

The second bargain was a new and distinct agreement whereby the first was rescinded, and new obli-

gations assumed by the parties wholly inconsistent with the first. The first was an exchange of horses, the second was a sale, by the defendant of his horse, after rescinding the first, for the sum of $100.

The question now is, do the representations and warranties given on the first enter into and form a part of the second. If they do, the judgment is right, and should be affirmed; if not, it must be reversed. * * *

"* * * Can we say that the representations made with reference to an exchange of horses would have been made had the second bargain been the one under discussion? It seems to me not. When that bargain was concluded, the rights of the parties were fixed, and a new bargain, made in regard to the same property, must rest on its own facts and circumstances." Judgment was therefore reversed.

In the case of *Byrd v. Campbell Printing Press and Manufacturing Co.,* 90 Ga. 542, the syllabus, which we quote, states briefly the proposition of law upon which we rely in this case.

"The plaintiff having made to the defendant a written offer to sell him a machine under full guarantee in certain designated respects, but in no others, and at a named price to be paid in specified installments, the writing providing that defendant might take the machine on three months' trial before deciding whether or not he would accept it; and he, before the expiration of that time, having thoroughly tested the machine and pointed out to plaintiff's agent its failure, in consequence of various defects he had discovered, to come up to the proposed guarantee, and having therefore de-

clined to purchase it on the terms proposed, but having afterwards, with a full knowledge of the machine and its defects, purchased it at the same price, without express warranty, upon a proposition made by himself and on terms in some respects more favorable to himself, giving his promissory notes in settlement, it is not a valid defense to an action thereon that there was a breach of the guarantee in the original offer to sell; or that in consequence thereof the consideration of the notes failed, totally or partially; or that the machine was not merchantable and reasonably suited to the use intended."

So in our case, even if we assume that the construction company made its contract of April, 1907, to install a gas-making machine of a certain capacity, relying upon a representation or guarantee of the gas company concerning the quality of the fuel that would be furnished, nevertheless if the construction company, after the failure and abandonment of that contract, entered into a new contract which did not express such guarantee, it could not rely on a breach of the original guarantee as a defense.

(*c*) *Oral specifications, conditions, warranties or agreements made prior to, or at the same time as, a formal written contract, but not expressed therein, form no part of the contract between the parties and cannot be proved to vary or add to the written contract.*

"Written contract is presumed to contain the entire agreement of the parties, to the exclusion of previous conversations not incorporated into it."

Benjamin on Sales, pp. 171, 208.

"If the article is sold by a formal written contract or a regular bill of sale, and that is silent on the subject of warranty, no oral warranty made at the same time, or previously even, can be shown."

Id., pp. 519, 625.

It is surely unnecessary to multiply the authorities that give judicial sanction to the established rule that all prior, and contemporaneous, oral negotiations and agreements between the same parties are presumed to have been merged in the final written contract, unless omitted therefrom by fraud, accident or mistake.

Ellicott Mach. Co. v. U. S., 43 Ct. Cl. 469;
Eisert v. Adelson, 121 N. Y. S. 446;
Illinois Life Ins. Co. v. Tully, 174 Fed. 355;

The case of *Nounnan v. Sutter Co. Land Co.*, 81 Cal. 1, illustrates the rule we are now discussing. It was an action for damages for fraudulent representations, alleged to have been made by respondent, to induce appellants to enter into a contract to construct a levee on the lands of the former. The representations relied upon as fraudulent are stated in the complaint to be, that the defendant represented to the plaintiffs that he wished them to construct a certain levee upon the lands of the defendant, and represented to them that the amount of earth necessary to be placed upon said levee, in order to construct the same, was 350,000 cubic yards, and that the character of the earth along the line of the levee was light, sandy loam, and a good scraper material. That he dissuaded the plaintiffs from making an examination of the ground themselves, and

said that the plaintiffs could entirely rely upon the accuracy of the statements made. That the plaintiffs relied upon these representations and were induced thereby to abstain from making an examination. That these representations were untrue, the fact being that the cubic contents of the said levee was 500,000 cubic yards, and that the character of the earth, except very near the surface, was stiff adobe and hardpan, both of which are more difficult to move than light, sandy loam. That, as the work proceeded, it was at first of the character represented, but became harder as the work progressed, but the plaintiffs continued to believe that the quantity of the hard material would be but small. That finally the plaintiffs discovered that nearly all the earth necessary to be removed, in order to build the levee, was very stiff adobe and hardpan, and by reason of this discovery the plaintiffs quit work and abandoned and repudiated the contract, and demanded of defendant the reasonable value of the work done.

A demurrer to the complaint was sustained and the plaintiffs refusing to amend, judgment was rendered in favor of the defendant, and from this judgment the plaintiffs appealed. The Supreme Court, in discussing the case, says:

"It is evident from the contract itself that the plaintiffs did not regard either of these representations as material, and that they did not rely upon them. They could have protected themselves against both of the contingencies covered by the representations, in their contract. They were, by the terms of the agreement, to have a fixed sum per cubic yard for the work. There-

fore, the amount of earth necessary to be moved in order to complete the work was immaterial, except that they were required to have the same completed within a certain time, or forfeit a part of their compensation. They could easily have guarded against this by providing that, if the work overran the quantity named, a longer time should be allowed them. As to the representation that the material was of a kind that would be easily worked, they could have protected themselves by providing that for that class of work they should have twelve cents per cubic yard, and for more difficult or expensive material to handle, a greater sum. To have inserted such provisions in the contract would have been but an act of common prudence. If they had regarded these matters as material, and contracted with reference to them, they would no doubt have been inserted.

"Treating these as a part of the negotiations, leading up to and forming the basis of a contract, we must presume that the entire negotiations of the parties were included in the written contract as executed, and so presuming, we must hold that they were bound to move the earth contracted to be handled, and to do it within the time named, without reference to its quantity or quality. (Civil Code, Sec. 1625; Pickering v. Dowson, 4 Taunt. 779.)

"This was their contract. Treating them as mere representations, made to induce the making of a contract, the contract itself furnishes sufficient evidence of the fact that they were not relied upon, and were not regarded by the plaintiffs as material. Besides, so far

as both the quantity and quality of the material were concerned, the complaint shows a waiver on the part of the plaintiffs of the right to contest the contract on that ground. They did not stop work when they found the material to have been different from the kind represented, but kept right on with the work long after such discovery. Nor did they stop work when they had handled 350,000 cubic yards of earth. This shows that they must have been willing to handle the kind of material they found, and in a greater quantity than the defendant had represented would be necessary, at the price named in their contract. Having continued on after they must have known that the alleged representations were fraudulent, we must presume that they were willing to, and did, waive the fraud, with the hope, we suppose, of again finding a soft spot of earth. Having taken this risk and made the defendant liable for the work done, after they discovered the alleged fraud at the contract price, it was then too late to recover on the ground that such representations had been fraudulently made. (Citing cases.)

For these reasons the complaint was bad and the demurrer to it was properly sustained."

(*d*) *The rule of merger of prior or contemporaneous oral negotiations and agreements applies also to prior written agreements or representations.*

These are merged in the subsequent written contract and if not expressed therein are deemed excluded.

The case of *Crandall et al. v. Rhodes et al.*, 20 Fed. Cas. p. 240, No. 11,556, was an action of *assumpsit,*

founded on a warranty that a vessel, called the Baltic, was built mostly of white oak timber. It appeared that, in July, 1851, negotiations for a sale of the vessel were had between the parties, through the agency of W. W. Brown, a ship broker. * * * While the negotiations were going on, Brown wrote to the plaintiffs several letters, one of which contained a representation that the vessel was built mostly of white oak timber. * * * On the 12th of July, 1851, the sale was agreed on, and the defendants signed a written memorandum which was as follows:

"Providence, July 12, 1851. We have sold to Randall & Stead, this day, through W. Whipple Brown, the bark Baltic, now at East Boston, for twelve thousand eight hundred dollars, to be paid next Tuesday, as follows: Twenty-five hundred dollars cash, their note, thirty days, interest added, for five thousand one hundred and fifty dollars, indorsed by Thomas J. Stead, of this city, and their note for five thousand one hundred and fifty dollars interest added, sixty days, indorsed by Thomas J. Stead. Full packages of beef, pork, bread, and flour are to be taken out by the owners, all other small stores belonging with the vessel.

(Signed) J. & P. Rhodes."

A corresponding paper, setting forth the purchase, was signed by the plaintiffs. The breach relied on was, that only a small part of the frame of the bark was found, on examination, to be white oak. The court, speaking by Curtis, J., said:

"There is no doubt that a representation, intended by the vendor as a warranty, and acted on as such by

the vendee, amounts in law to a warranty; and it is also well settled that such representation so operates, although made during the treaty for a sale, and some days before the sale was finally agreed upon, if it appear that it was not withdrawn, and the contract of sale did not exclude it from its terms. But the question now presented is, whether the representation relied on was not excluded from the contract of sale, so as to form no part thereof. It is not contained in the written memorandum, signed by the defendants. Now, the general rule is that, when negotiations have terminated in a written contract, the parties thereby tacitly affirm that such writing contains the whole contract, and no new terms are allowed to be added to it by extraneous evidence. But it is argued that this memorandum is not the written contract of sale; that it contains only a statement of the fact that a sale has been made, and a description of the thing sold, the price and terms of credit. But this is all that is necessary to make a complete contract of sale; and to assume that anything more existed, and allow it to be shown, would violate the rule above stated. It is true that, in Bradford v. Manly, 13 Mass. 139, and Hastings v. Lovering, 2 Pick. 214, it was held that a bill of parcels was not the contract of sale, it being intended as the court says, in the first of those cases, only as a receipt for the price, and not to show the terms of the bargain. But here the writing could not have been intended for a receipt, and must have been intended to set forth, what it does set forth, a contract of sale; and, if so, it

must be taken to embrace the whole contract, and consequently a warranty was not one of its terms.

"It is argued that the reference to Brown, contained in the contract, may be sufficient to incorporate into it the letters which he wrote in the course of his agency, and which led to the making of the contract. These letters might have been so referred to as to make their contents part of the contract; but to have this effect, the contract must show that such was the intenion of the parties. This intention does not appear by the reference to Brown's agency. The natural meaning of that reference is only that Brown was the agent through whom the contract of sale, shown by the writing, was negotiated. There is nothing to show that the parties agreed to make all he had done and said part of the contract.

"I am of opinion that the plaintiffs are not entitled to recover; and, unless they elect to become non-suit, the jury will be directed accordingly."

This authority is peculiarly pertinent because of the fact that there was a reference in the contract to the fact that the sale was made through Brown, the agent who made the false representation complained of. But the court points out that the intention to adopt the acts of Brown and make them part of the contract is not expressed in the contract, and his representations, therefore, form no part of it. So in the case at bar, there is a reference in the contract in suit to the "economy of lamp-black fuel" mentioned in the former contract of April, 1907. But this reference is merely to the *quantity* of fuel to be used for each thousand feet

of gas produced. It is a reference to economy of operation. And if the former contract had contained specifications of *quality* of the lamp-black these would not have been adopted and incorporated in the new contract by such a reference. The parties acted in accordance with this principle of law and in the new contract of July, 1909, they inserted the only specification of quality of lamp-black fuel that was considered a part of their contract, viz.: "Lamp-black fuel, containing not more than ten (10%) per cent moisture." [Tr. p. 41.]

The case of *Wetherill v. Neilson,* 20 Penn. State 448, 59 Am. Dec. 741, was an action on promissory note made by Wetherill, plaintiff in error, and given in payment for a quantity of soda ash purchased from Neilson, defendant in error, plaintiff in the court below. At the trial Trimble, a merchandise broker, testified that he had negotiated the sale and that Neilson had represented to him that the soda ash was of forty-eight degrees strength, and that he so represented the article to the defendant. Testimony was offered to the effect that the soda ash in question was below forty-eight per cent and not merchantable, but this evidence was not admitted by the trial court and the defendant excepted. Verdict was rendered for plaintiff and the defendant brought error. The court said:

"There is no difference in principle between this case and the numerous ones referred to in the argument establishing the rule that the purchaser of the article takes the risk of the quality of the article purchased, unless it be warranted or he be fraudulently misled as

to it. If mere representations were to be treated as part of this contract, it is not easy to see why they should not be so as to all other contracts. And if they were, then the laws would foster a spirit of litigation by encouraging every man who is disappointed in the advantages expected from a bargain to drown his sorrows in the excitement of an action at law. The law repairs broken contracts, but it does not attempt to satisfy mere expectations. It is especially important that this should be the rule as to representations of the quality of goods sold, for there is nothing on which people are more apt to differ, and nothing on which they are less apt to trust each other."

In this state it has been repeatedly held that a warranty of quality cannot be proved or availed of for the purpose of showing that a written contract was made with reference to an article or material of a particular quality unless the warranty or specification of quality is expressed in the contract. It is so held even when a sample is exhibited or delivered, and the contract might have been made in reliance upon it.

Thus, in the case of *Harrison v. McCormick*, 89 Cal. 327, an action for a balance alleged to be due on account of the sale of fifty tons of coal, under the name of Montana Lump Lehigh Hand-picked Coal, the answer set up, among other defenses, that the coal was sold by sample, and that the coal delivered did not correspond with the sample. The contract of sale was in writing and set forth the purchase of the quantity of coal stated, and the price and terms of payment. The defendants were permitted to show, by parol evidence,

that the contract was for coal of the same kind and quality as the defendants had previously bought from the plaintiff and which they were then using in their foundry, and that the coal delivered was not of the kind or quality therein referred to. The question presented on appeal was whether this parol evidence was properly admitted. On this point the court said:

"We do not see how the admission of this evidence can be sustained. Its effect was to show that coal was sold by sample, and thereby to import into the contract a warranty that the coal sold was to be equal to the sample. When the contract is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence cannot be allowed to show a sale by sample. (Tiedeman on Sales, Sec. 188; *Wiener v. Whipple,* 53 Wis. 298; *Thompson v. Libby,* 34 Maine 374.) * * * The respondents further insist that this evidence was proper, because it tended to show that a fraud was practiced upon them in the making of the contract. This would be so, if such a defense had been made in the answer. The answer denies the execution of the contract alleged in the complaint, and avers that the contract of sale was by sample, but it contains no averment that defendants were induced to enter into the contract alleged in the complaint by any fraudulent representation, as that the coal described in such contract by name was the same kind and quality of coal previously bought by defendants from plaintiff, and without such averments, or an allegation of mistake in reducing the contract to writing, this evidence was irrelevant and immaterial."

In our case there is no question but that the lamp-black furnished to the defendant was the material referred to in the contract—the court so finds. The adverse finding, by reason of which judgment was given against the plaintiff, was that the lamp-black was not equal to a sample which is not referred to in the contract.

In the case of *Gardiner v. McDonogh,* 147 Cal. 313, a contract had been made for the purchase of a quantity of beans. The beans were shipped by the seller to the buyer at San Francisco, and the purchaser refused to accept them on arrival because they were not equal to the sample which, it seems, had been given to the purchaser prior to the sale.

One of the points urged by the appellants was that the trial court erred in permitting the plaintiffs to show by parol evidence that there was a sale by sample.

"It is insisted," says the court, "that the contract of sale on its face was complete and perfect; that its terms did not mention anything about a sale by sample, and that those terms could not be varied by parol evidence on this subject; that the admission of such evidence was in violation of the provisions of section 1856 of the Code of Civil Procedure, which declares, in effect, that when an agreement has been reduced to writing by the parties, it is to be conclusively deemed to contain all the terms agreed upon, and that no evidence of the agreement other than the writing can be given * * *, and that the admission of such evidence in the case at bar was in direct conflict with the decision of this court in *Harrison v. McCormick.*

"We are satisfied that the admission of this evidence for the purpose of showing that the sale was a sale by sample, cannot be sustained."

This decision of the Supreme Court of the state of California is based upon a rule of evidence laid down by statute in this state (C. C. P. 1856), and decisions of the state court upon questions of this character are deemed binding upon the federal courts sitting in the state.

In the case of *Germain Fruit Co. v. Armsby Co.,* 153 Cal. 585, the Supreme Court of California distinguishes between the admissibility of parol evidence for the purpose of identifying the subject-matter of a written contract, and parol evidence intended to prove a warranty of quality not expressed in the contract. The contract involved in that case witnessed to the sale by the defendant to the plaintiff of twenty-five hundred boxes of apricots, described as lot "A," lot "K," lot "C" and lot "E," at a price and on terms stated in the contract. On the question raised by the appeal, relating to the admissibility of parol evidence to affect the terms of this writing, the court said:

"The description of the property sold is admittedly incorrect. * * * The contract calls for apricots, while the evidence shows, and both parties admitted, that *dried* apricots were the subject of the agreement. It is conceded that this defect of description may be supplied by parol. Respondent contends that the same rule warrants the introduction of parol evidence to determine what apricots were intended to be described by lot 'A,' lot 'K,' lot 'C' and lot 'E,' and also to identify

them by sample. There is no question as to the former proposition, and in a proper case and under proper circumstances the latter would no doubt be true. * * * If the facts had been such as to make the evidence proper upon this theory alone, the purpose of its introduction should have been limited so as to exclude its consideration in connection with the question of warranty of quality. On the contrary, the very purpose of its introduction was apparently to add to the written contract of sale another term, a parol warranty of quality by sample. The court permitted the introduction of parol evidence as to sample, and applied it on the theory that it was competent proof of a warranty. It expressly found such warranty, and the judgment for damage rests upon its breach. * * * The finding and judgment, therefore, rest on the parol evidence.

"It is urged by respondent in support of the court's action, that an ambiguity or uncertainty appears in the language of the instrument by the use of the terms 'lot A, 287 boxes,' etc. The matter is open for explanation by parol evidence, and that such ambiguity or uncertainty may as well be removed by showing the term was intended to mean according to sample 'A,' as by showing that it was intended to mean some certain pile of 287 boxes. * * *

"There is much weight in this contention. We must, however, bear in mind that the law permits no new term to be introduced into a written contract by parol, while it does permit such evidence for the purpose of making certain an ambiguous description, or for the purpose of identification. * * * While from the

parol evidence introduced the inference may be drawn that the parties intended the sale should be on a warranty by sample, we cannot permit any bias or knowledge of the fact to lend weight to the construction of the instrument. Admitting that such was the intention, an examination of the writing shows that if this were the case, there was an entire failure to embody such intention in the contract. The language used was unfit and inappropriate to express a warranty of quality by sample or otherwise, being language importing description and identity only. * * * Like the statute of frauds, this rule is founded upon long and convincing experience that written evidence is more certain and adequate than slippery memory. So long as the rule is applied, the actual contract made can be preserved without fear of its being affected in its terms by the frailties of an interested human recollection. That sometimes the written contract does not include all the terms intended by reason of neglect or oversight, and injustice is thereby done in particular cases, does not justify the abandonment of the rule. * * * The admission of testimony to show a sale by sample for the purpose of establishing an express warranty of quality of the apricots sold, was error. The finding of such warranty was without competent evidence to sustain it, and the case was tried on an erroneous theory, inconsistent with the rule declared in *Gardiner v. McDonogh,* 147 Cal. 313."

For the reasons given and under the rules laid down in the foregoing decisions of the Supreme Court of this state, we respectfully insist that the finding of the trial

court in this case to the effect that the gas company undertook, agreed and warranted that the lamp-black fuel to be furnished should be of a certain quality of hardness and tensile strength not inferior to the sample briquette obtained by the construction company from the gas plant prior to the execution of the contract of April, 1907, was without competent evidence to sustain it; that this case was tried in the court below on an erroneous theory inconsistent with the rules of evidence established by the Code of Civil Procedure of this state and repeatedly declared by the Supreme Court of California.

The portion of section 1856 of the Code of Civil Procedure of the state of California, referred to in the foregoing decisions, reads as follows:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: * * *"

We believe that this court will follow the decisions of the Supreme Court of this state in its construction of section 1856 of the Code of Civil Procedure and in its application of the rules of evidence announced in the three cases last cited. These decisions have established rules of property and conduct in this state upon which the parties to this action must be deemed to have relied when they made, in this state, a contract to be performed here.

The rules of evidence established by statutes of a state are followed by the courts of the United States when sitting in that state.

Ryan v. Bindley, 1 Wall. 66;
M'Niel v. Holbrook, 12 Pet. 84;
Fitch v. Creighton, 24 How. 159.

State decisions which have become rules of property and action in the state are always regarded by the federal courts as authoritative declarations of what the law is.

Burgess v. Seligman, 107 U. S. 20.

The interpretation of a state statute by the state courts with respect to its application to contracts of insurance issued by a foreign insurance company, is binding on the Supreme Court of the United States.

New York Life Ins. Co. v. Cravens, 178 U. S. 389.

II.

The court erred in failing to find that the apparatus did not have the minimum gas making capacity called for by the contract, and did not have the ability to made gas of the quality and with the fuel economy required by the contract.

(1) Apparatus Failed to Reach an Established Capacity of 2,000,000 Cubic Feet of Gas Per Day.

We refer the court to article 3 of the contract of July 12, 1909, which provides as follows:

"3. And the party of the first part agrees that if

said party of the first part cannot, during said test, bring said apparatus to an established capacity as herein defined, of at least two million (2,000,000) cubic feet per twenty-four (24) hours, of the kind of gas specified in said contract, with the same economy of oil and lamp-black fuel containing not more than ten (10%) per cent of moisture mentioned in said contract, said party of the first part will remove at once without any cost to the party of the second part, said apparatus from the premises of the party of the second part, and repay to said party of the second part all money heretofore paid or advanced by said party of the second part to said party of the first part under said contract, to-wit: twenty-six thousand eight hundred twenty-three and 45/100 ($26,823.45) dollars."

The amount of lamp-black fuel from which the defendant agreed to produce 1000 cubic feet of gas was 35 pounds and the candle-power of the gas which the defendant agreed to produce was 20 candles. The actual result of the 20-day test from March 10th to March 30th, 1910, was as follows:

GAS MAKE.

March	10,	2,700,000	cubic	feet.
"	11,	2,422,000	"	"
"	12,	2,247,000	"	"
"	13,	1,936,000	"	"
"	14,	72,300	"	"
"	15,	No gas.		
"	16,	107,000	"	"
"	17,	2,039,000	"	"
"	18,	2,095,000	"	"

"	19,	2,028,000	"	"
"	20,	2,136,000	"	"
"	21,	2,171,000	"	"
"	22,	2,074,000	"	"
"	23,	2,008,000	"	"
"	24,	2,015,000	"	"
"	25,	1,956,000	"	"
"	26,	1,950,000	"	"
"	27,	1,824,000	"	"
"	28,	1,640,000	"	"
"	29,	1,290,000	"	"

making on an average during said final test of 1,735,-565 cubic feet per day. [Tr. p. 347.] The average amount of fuel used by the defendant's apparatus during said test was 39.58 pounds per thousand feet of gas made as against 35 pounds specified in the contract [Tr. p. 347], and the candle-power of the gas produced was 19.1 as against a minimum of 20 candles required by the contract. [Tr. p. 348.]

This absolute failure on the part of the defendant's apparatus is ascribed solely by Mr. Pederson to the fact that the fuel furnished by the gas corporation did not have as great a tensile strength as the fuel would have had, had the bricks been made from a carbon containing less than ten per cent of moisture. We believe that we have shown that this contention of the defendant is unsound.

Since the court may enquire why the defendant's apparatus failed to live up to the minimum requirements of the contract, we direct the court to the testimony of the plaintiff's experts in the manufacture of

water-gas from lamp-black fuel, who were unanimous in their statement that the carburetor on the defendant's apparatus was too small in order to enable the apparatus to make the amount of gas guaranteed. [Tr. pp. 737, 699.] The defendant admits that during its final test of the apparatus, the machine made more gas than it ever had in its history of nearly three years at the gas corporation's plant. Mr. Pederson testified that the set had never theretofore even approached a make of 2,000,000 feet a day. [Tr. pp. 528, 565.] It is therefore evident that there was either some structural defect in the defendant's set, or else that it is a physical impossibility to manufacture a water-gas set which will produce the quantity of gas guaranteed by the defendant, with the fuel economies specified.

One reason assigned by defendant's witnesses for the failure of the apparatus was that a large amount of fine carbon was carried in the draft from the generator into the carburetor, thus choking the machine, and that this fine carbon came from the brittle and easily pulverized bricks.

When pressed on cross-examination as to what amount of gas the defendants were able to make in their apparatus when they were operating same in February of 1910, with fuel which the defendant claims was superior to the fuel furnished during the final test, Mr. White testified that the gas made was as follows [Tr. p. 565]:

Feb. 17, 1,704,000 cubic feet.
" 18, 1,751,000 " "
" 19, 1,790,000 " "

"	20,	1,872,000	" "
"	21,	1,811,000	" "
"	22,	1,540,000	" "
"	23,	1,561,000	" "
"	24,	1,500,000	" "
"	25,	Shut down.	
"	26,	1,644,000	" "
"	27,	1,532,000	" "
"	28,	1,294,000	" "

White had just previously informed the court that he thought with ideal fuel the machine had a capacity greater than 2,000,000 cubic feet. Trying to reconcile this testimony with the defendant's testimony as to what the machine actually did make in February when they claimed the fuel was satisfactory, White testified as follows in response to the following question by the court [Tr. p. 565]:

"Q. (By the Court): If the capacity of the generator or apparatus is such as you have testified, how is it that you account for not making a larger production for the amount of fuel that you consumed on this test?

A. We did not have enough air for this test, and prior to the final test, we added another 20-inch blast line, which gave us the increased efficiency."

While the testimony concerning the amount of gas actually made by the defendant during the final test shows that apparently the increase of blast did increase the gas-making capacity of the machine, still the testimony of Mr. White, when viewed in connection with the testimony of Mr. Gouldlin, the president of the defendant company and the designer of all its apparatus,

shows that by increasing the blast Mr. White caused to exist the very condition which made the final test of the apparatus a failure and which condition the defendant has sought to claim was caused by a defective quality of lamp-black fuel supplied by the gas company.

The testimony of the plaintiff's gas operators who had had years of experience in the use of lamp-black fuel shows that in the use of this fuel a considerable breakage of the fuel occurs and that a large amount of fine particles of fuel are carried from the generator into the next portion of the apparatus known as the carburetor. The defendant had had two years experience in the use of this lamp-black fuel in its apparatus at the gas company's plant at the time the contract of 1909 was entered into. And in this connection we call the court's attention to the provision of said contract, as shown on page 40 of the transcript, which provides that the defendant would before commencing any test of said apparatus make certain changes in the apparatus, one of the three changes being to "provide ample means for the collection and easy removal of dust and fine carbon carried from the generator to the carburetor."

Mr. Gouldlin, the president of the defendant company, testified that in changing the apparatus according to the contract of July, 1909, instead of providing any especial apparatus for the collection and removal of this fine carbon, he had caused the generator to be enlarged, stating that he thereby increased what was known as the grate area, which means that the fuel placed in the generator was spread over a larger bed. The result of this, Mr. Gouldlin stated, was to mini-

mize the effect of the strong air blast which in the manufacture of gas in these sets is injected into the base of the generator so that the air is forced up through the fuel bed, supplying the oxygen necessary for a complete combustion of the fuel. [Tr. p. 622.] Mr. Gouldlin explained from an engineering standpoint that the fuel bed in the original set had been so small that the effect of this heavy air blast upon the fuel was to disintegrate the fuel and cause a large quantity of fine carbon to be carried over from the generator into the carburetor. By increasing the grate area, Mr. Gouldlin stated the air blast would be distributed over a larger area and would thus pass through the fuel with less force or velocity, the result being that less carbon would be carried over into the carburetor. At this point, we again call the court's attention to the fact that the defendant's sole claim as to the evil effect of the gas company's fuel being brittle, was that the bricks broke up when thrown into the generator (although they admit that the bricks were delivered at the defendant's set in a good condition) [Tr. p. 545], so that a large quantity of fine carbon went from the generator over into the carburetor, thus clogging the carburetor and destroying the gas-making efficiency of the apparatus.

Now, considering Mr. Gouldlin's testimony as to what he did, as heretofore set forth, to prevent this very same carbon from being forced from the generator into the carburetor, we find that the defendant's operator, Mr. White, at the last moment and just before the final test was commenced added a new blast

line to the defendant's generator and thus *doubled the amount of air blast* which was sent into the generator and up through the fuel. [Tr. 567.] Thus actually undoing and nullifying the work of Mr. Gouldlin, the designer of the set. We do not think it can be controverted but what this action on the part of the defendant's own operator, while it perhaps increased the gas-making efficiency of the machine for a few days, was the direct and only reason why the apparatus became clogged and failed to sustain even the minimum gas-making capacity required by the contract for the stipulated period of twenty consecutive days, and for the trial court to have placed the blame for the failure of this set upon the fuel supplied by the defendant was clearly a finding made in the absolute face of evidence which shows plainly that an engineering blunder of the defendant was the reason why the defendant's apparatus was a failure.

(2) The Apparatus Failed to Produce, During the Final Test, Gas of a Candle-power of at Least Twenty Candles.

The court found that during the final test the gas company produced a gas of less than twenty candles. It was the contention of the defendant that the reason why they made a gas of less than twenty candles was that two of the gas company's employees, named Fargher and Robinson, had told them that the average candle-power that the gas company desired to produce was approximately nineteen candles [Tr. 461], and that Fargher asked the defendant to keep its machine in such a condition as to produce a gas not exceeding

nineteen candles. Mr. Fargher and Mr. Robinson deny that they ever made any such statement or request to the defendant and the evidence shows that neither Mr. Fargher or Mr. Robinson had absolutely any authority for making any such statement and no authority for permitting the defendant to deviate from the express terms of its contract, and the gas company's officials testified at the trial stated that they had no knowledge that any such statements or requests had ever been made to defendant as regards the candle-power, and the defendant does not claim that it had any higher authority for violating or deviating from this portion of its contract except the alleged unofficial statements of Mr. Fargher and Mr. Robinson. We submit that as a matter of law, the defendant cannot avail itself of this unauthorized statement attributed to an employee of the gas company. If a contracting party can be excused from the performance of its solemn contracts, by such loose procedure, a contract would be a useless factor in commercial life.

(3) The Apparatus Failed During the Final Test to Produce Gas with the Consumption of Not More Than 35 Pounds of Carbon per Thousand Cubic Feet of Gas Made.

The evidence shows that the average carbon consumption during the final test was 39.58 pounds of carbon per thousand cubic feet of gas made, while the contract called for a consumption not exceeding 35 pounds. This excess consumption of carbon meant that the defendant's apparatus in producing 2,000,000

cubic feet a day would consume 20,000 pounds of carbon more than the contract requirements, which according to the value of the lamp-black bricks in the Los Angeles market at that time would have resulted in a loss of $30 to $40 a day to the gas company, which in a year's time would amount to approximately $12,000 loss in fuel. The defendant was absolutely unable to offer any excuse for the failure of the machine to produce gas with the carbon fuel economies guaranteed. While the defendant introduced evidence through its operator, Mr. Pederson, to the effect that the apparatus could have made more than 2,000,000 cubic feet of gas per day if the fuel had had the tensile strength the defendant claimed the contract required it to have, the defendant, however, did not introduce one particle of evidence to the effect that the apparatus would have been able to have produced gas with a fuel consumption not in excess of 35 pounds, if the fuel had possessed a tensile strength as great as the defendant claimed it should have possessed. The defendant sought to obtain from its operator, Mr. White, an expert statement as to what the fuel consumption of the apparatus would have been had the fuel been ideal according to the defendant's notion, yet Mr. White stated that he was absolutely unable to state what fuel economies the machine could have attained.

III.

The Court Erred in Finding that a Kiln Dried Brick was Not in Compliance with the Contract.

The defendant, apparently realizing throughout the trial the weakness of their contention that the fuel furnished during the final test was defective because it was manufactured into brick form from a lamp-black containing more than ten (10%) per cent moisture, tried to shift the blame onto the process whereby the gas company reduced the moisture content of the bricks. We have shown, and the evidence is uncontroverted on this point, that in kiln-drying the bricks the gas company was doing the only thing which anyone could suggest might have been done to have reduced the bricks to the proper moisture content. The defendant saw the gas corporation kiln-drying the bricks for several weeks prior to the test and had never made any objection or complaint. [Tr. 509, 544.] The evidence shows that this was not the first time that the gas corporation had resorted to kiln-drying in order to get the bricks reduced to the desired moisture content, for it appears that the bricks which were used by the defendant in a test of its apparatus which was conducted in July, 1908, were bricks that had been kiln-dried. [Tr. p. 687.]

It is true that defendant's operators White and Pederson testified that in their opinion the kiln-drying of a brick destroyed its tensile strength, whereas sun-drying of the bricks did not. Their reasons given for this, as set forth in the transcript, pages 428 *et seq.* and 556, are not at all satisfactory or conclusive and

are not based upon any accurate data or experiment. [Tr. 580-581.] On the other hand, the gas corporation's operators who had had years of experience with bricks both sun-dried and kiln-dried, stated that there was absolutely no difference between them as to the tensile strength and that as a matter of fact a brick which was kiln-dried could not be distinguished from one which was sun-dried [Tr. 134], the gas corporation introducing the most conclusive evidence upon this point through the testimony of their chemist, Mr. Wade, who testified to having subjected both a sun-dried brick and a kiln-dried brick to the drop test prescribed by the United States Geological Survey for the determination of the tensile strength of such substances [Tr. 724 *et seq.*], and this test as described minutely on pages 724 and 725 of the transcript shows that as a matter of fact the kiln-dried bricks possess a greater tensile strength than do the bricks dried in the sun. The accuracy of this test was not disputed and no evidence was introduced by the defendant calling in question the conclusiveness of such a test or contradicting Wade's testimony upon this subject.

IV.

The court erred in incorporating into the written contract of July 12th, 1909, and treating as part thereof an alleged conversation reputed to have taken place between the defendant's agent, Mr. Pederson, and the Gas Company's representative, Mr. Luckenbach, in March, 1907, prior even to the execution of the first contract, dated April, 1907.

We submit as a matter of law, the defendant had no right to introduce any evidence as to any oral representation which may have been made as a part of a distinct and separate contract which was made and entered into at least two years prior to the contract in issue and which did not and cannot as a matter of law form any part of the contract of 1909. The defendant testifies that at the time the contract of 1907 was entered into it had little knowledge concerning the use of lamp-black as a fuel and that the contract of 1907 was entered into solely in reliance upon the representations made to them by the gas company. The evidence introduced in the trial fails to disclose any written representation on the part of the gas company to the effect that the fuel which should be furnished should possess any degree of hardness or tensile strength whatever, and the entire claim of the defendant is based upon the testimony of Mr. Pederson as to an oral conversation alleged to have taken place between Mr. Pederson and Mr. Luckenbach in *March,* 1907, which conversation Mr. Luckenbach denies ever took place. Mr. Pederson testified that at Mr. Luckenbach's instance he had gone to the gas plant and gotten a sample of lamp-black fuel in the form of a briquette, which

the evidence shows is cylindrical in form, about 2½ inches in length by 1½ inches in diameter, that after having procured this sample the following conversation took place between himself and Mr. Luckenbach [Tr. p. 407]:

"At that time we were getting pretty close to a contract, having talked over specifications and other matters pertaining to this work. Mr. Luckenbach emphatically wanted it understood that we should have a certain quality of fuel in making this contract and in getting results and I think he said, 'We don't want you to go and say afterwards that we promised you bricks such as you have seen down there and have obtained, but we are installing a bricking machine and that will be the form of the brick, but it will be the *quality* that you saw down there. It will be such fuel as that, but in a different shape,' and says to have this absolute without any misunderstanding we had better write it down. I think he then wrote this letter to confirm his conversation with me."

The letter to which Pederson there refers was a letter written by the gas company on March 5, 1907, and is set forth in full on pages 164 and 165 of the transcript, the part of the letter referring to the proposed fuel being as follows:

"In order that no misunderstanding may occur, the carbon to which we refer is a by-product from the manufacture of oil gas, with which you are undoubtedly familiar. The way we are handling this at present is, we feed it from the wash box by flume to the settling pits where the water is drained off and then the

carbon is either passed through a dryer or hauled into piles and sun-dried and then made into bricks or taken in large lumps from the pile and put into the generator.

"We are now negotiating for the purchase of a drier to handle all our product and *anticipate* that this drier will turn out our carbon with from five (5%) per cent to not to exceed ten (10%) per cent of moisture. After passing the drier, the same will be bricked for use in the generators."

It was the contention of the defendant, and the court's finding against the plaintiff regarding the fuel, was based entirely upon the contention that, in using the word "quality" in the conversation alleged to have occurred between Mr. Pederson and Mr. Luckenbach, Mr. Luckenbach meant that the fuel would have a tensile strength equal to that possessed by the small briquette sample which the defendant had obtained at the gas plant, although there is no testimony that Mr. Luckenbach ever even saw this sample. The plaintiff claims that, even if such a conversation ever did take place, which Mr. Luckenbach denies, that the word "quality" as used by Mr. Luckenbach referred solely to the chemical quality of the lamp-black, and this interpretation seems to be the only interpretation consistent with all of the correspondence and acts of the parties. Even the letter to which we have referred, that Mr. Pederson says was written in confirmation of this conversation, does not mention the fact that a sample has been furnished Mr. Pederson, nor does it use the word "quality" at all, and *makes absolutely no reference whatever to the tensile strength of the pro-*

posed fuel. In fact, the letter refers to a character of fuel which the gas company was not then making, but which it was in *contemplation* of producing, and there is no evidence in the case, nor do the defendants claim, that the gas company ever at any time after the execution of the contract of 1907 supplied the defendant with any fuel that did have a tensile strength anywhere approaching the tensile strength of this briquette sample, and there is no mention in any of the correspondence between the parties at any time, nor any evidence given in the trial, which shows that at any time between April, 1907, and March 18, 1910, at which time the defendant was in the middle of its final test, was the question of hardness or tensile strength ever mentioned between the parties.

The best method of ascertaining what is the proper construction to be placed upon a contract is to ascertain what the parties to a contract have done under the contract. If, as the defendant claims, the parties to the original contract of 1907 intended that the lamp-black bricks which were to be supplied the defendant were to have a tensile strength equal to the alleged tensile strength possessed by the sample briquette which defendant claims to have received from the gas company and if the tensile strength of the fuel was such a vital element, it is very strange that the evidence fails to disclose that at any time between April, 1907, and July 12, 1909, any complaint either written or oral was ever made by the defendant company that the lamp-black bricks furnished them did not possess the tensile strength to which they claim under the con-

tract they were entitled. All of the correspondence passing between the parties during this period is in evidence in this case and it is singular that the only complaint ever registered by the defendant concerning the fuel was that the lamp-black bricks furnished contained more than ten (10%) per cent of moisture [Tr. 179, 185-186]; and, as stated by Mr. Luckenbach, during the oral negotiations leading up to the execution of the contract of July, 1909, the only complaint made by the defendant concerning the fuel which had theretofore been furnished it was that the moisture content in the bricks was greater than ten (10%) per cent. The defendant does not deny this, neither does it claim that at any time prior to March 18, 1910, after the final test began, they ever complained about the tensile strength of the fuel, and the evidence fails to disclose at any time prior to that date any writing or conversation between the parties which had the slightest bearing upon the subject of the tensile strength or hardness of the proposed fuel.

In reviewing the correspondence that passed between the gas company and the defendant between April, 1907, and July, 1909, we find but two complaints were made concerning the fuel that had been furnished.

On December 16th, 1907, the defendant wrote the gas company as follows [Tr. p. 179]:

"Our water-gas plants are entirely beyond the experimental stage of water-gas plants, and in making the contract with you it was specifically stated that our guarantees were placed upon 'dry lamp-black' or lamp-black containing not more than 10 per cent of *moisture*.

The lamp-black briquettes furnished us at the time of this contract for our inspection were analyzed and found to contain an average of less than three per cent of *moisture*. Instead of the fuel which we had every reason to believe would be supplied, *and which was specifically mentioned in the terms of our contract,* we find that the fuel from which we are expected to make our guarantees good contains 35 per cent to more than 40 per cent by weight of *moisture*."

In a letter to the gas company dated June 7th, 1908, Mr. Pederson states that the defendant's fuel guarantees contained in the contract of April, 1907, were based upon Luckenback's letter of March 5th, 1907 [Tr. p. 164], and the sample of fuel furnished [Tr. p. 185], but no mention is made (and we think this is very significant) of the alleged oral guarantee upon the part of the gas company, upon which the defendant relied entirely during the trial. The letter then continues:

"From this you will see that we at no time contemplated to use MOIST LAMP-BLACK in the procuring of capacity, the guarantee applying to the use of *dry* lamp-black only in this respect."

In preparing for a test of the apparatus in June, 1908, Pederson wrote the following letter to the gas company [Tr. p. 190], which was in part as follows:

"We have made tests of the 14 tons of carbon which you have set aside for our use, and *find it contains less than* 10 *per cent of moisture.* We are making daily tests of such other carbon as you are supplying, and we

shall notify you if any of it is above 10 per cent *moisture.*"

The court will notice that throughout all the foregoing there is but one quality of the fuel that concerned the defendant—moisture. In the foregoing letter of December, 1907, the defendant says that the fuel they were to get was "specifically mentioned in the terms of the contract." Yet we scan the contract in vain for any other term specifically mentioned than that of MOISTURE. Moisture was the only thing that ever concerned the defendant, and when they finally found themselves falling down in a test with fuel that was of the required dryness, they had to seek another excuse, and then for the first time complained of tensile strength.

The plaintiff's evidence was to the effect that the bricks furnished the defendant during the final test of the apparatus in March, 1910, were equal to, if not superior, to that possessed by any bricks ever theretofore manufactured by them and supplied to the defendant. [Tr. 644, 694.] This statement the defendant does not deny in any particular except that the defendant's witnesses testified that during one period, to-wit, in January and February of 1910, which is a period intervening between the time of the execution of the contract of July, 1909, and the final test of the apparatus, they received from the gas company some bricks which were superior in tensile strength to the bricks furnished them during the final test [Tr. 566, 527], but this statement in nowise contradicts the aforesaid testimony of the plaintiff that the bricks fur-

nished in the final test were equal to, if not superior, to bricks furnished at *all times prior to July* 12th, 1909. The defendant does not claim that it ever received in its operation under the contract of 1907 any lamp-black fuel of a tensile strength even approaching the tensile strength which they claim was possessed by the sample briquette handed to them in March, 1907. If, therefore, the parties to the contract of 1907 at no time during the operation under that contract used a fuel having a tensile strength equal to that which the defendant now claims the fuel should have possessed, and the record is barren of any complaint ever made by the defendant that the gas company violated the contract of 1907 at any time by reason of furnishing a fuel which did not have this claimed tensile strength, we feel that the court is, as a matter of law, bound either to hold that under this state of facts the parties were not obliged under the contract of 1907 to supply a lamp-black fuel of the tensile strength equal to the sample briquette, or the court must hold as a matter of law that since such fuel was not furnished at any time during the operation under the contract of 1907, a provision cannot be read into the contract of 1909 requiring the gas company to supply a quality of fuel having a tensile strength equal to that possessed by the sample briquette obtained by the defendant in March, 1907. *If the parties did not require such fuel to be furnished under the contract of* 1907, *how can it be held that they expected that it would be furnished under the contract of* 1909, *in the absence of any express provision to that effect?*

V.

The court erred in finding that from the 10th to the 30th of March, 1910, the apparatus did not have such a twenty day consecutive test as provided for in the contract of July 12, 1909.

(1) The Commencement of the Test.

As heretofore stated, the defendant after the execution of the contract of July, 1909, made a preliminary test in August, 1909, in order to ascertain what changes it desired to make in the apparatus preparatory to the final test, and we hereby call the court's attention to the fact that during these preliminary tests the fuel furnished the defendant was a portion of the same batch of fuel which the gas company thereafter kept on hand and supplied to the defendant during the final test. [Tr. p. 687.] In referring to this preliminary test, the president of the defendant company in a letter to the gas corporation dated September 18, 1909 [plaintiff's exhibit No. 13, Tr. p. 204], stated as follows:

"The last experimental operation under Mr. Pederson's direct supervision was of the utmost importance to us, definitely settling several features of which we were not entirely satisfied before, as to general results. It has been a long drawn out battle, but in conclusion assure you that I am now more than ever convinced of ultimate success, and I am extremely anxious that this shall be reached with the least possible delay."

The evidence shows that after the changes were made in the apparatus, the defendant's operator, White,

arrived upon the scene and took charge of the set and in some preliminary experimental work which Mr. White did with the machine, he used lamp-black bricks which contained more than ten (10%) per cent of moisture and so pleased was Mr. White with the moist bricks that on December 13, 1909, he caused the following letter to be written to the gas corporation [plaintiff's exhibit No. 14, Tr. p. 207]:

"Los Angeles, Cal., December 13, 1909.

Los Angeles Gas and Electric Corporation, 645 So. Hill Street, City.

Gentlemen: We would prefer, if agreeable to you, that you furnish us the fuel bricks for the new machine which we have installed, containing say from 16 per cent to 25 per cent moisture, instead of 10 per cent, as formerly, *similar to the fuel bricks you are now using in your machine.* (Our italics.)

Yours very truly,

THE WESTERN GAS CONSTRUCTION COMPANY.

By E. C. WHITE."

A few days later, the defendant's chief operator, Mr. Pederson, having arrived upon the scene, the defendant caused the following letter to be sent to the gas corporation, dated December 28, 1909 [plaintiff's exhibit No. 15, Tr. p. 207], revoking its letter of the 13th:

"Los Angeles, Cal., December 28th, 1909.

Mr. C. A. Luckenbach, Manager of Construction, Los Angeles Gas and Electric Corporation, Los Angeles, Cal.

Dear Sir: In confirmation of our conversation this morning, I beg to state that we desire to withdraw our

letter of December 13th in reference to fuel to be used during the test of the water-gas apparatus now being installed by us. *The fuel that you have on hand at present will be satisfactory* (our italics), but we feel that it must be protected from additional moisture, and would ask that you protect the fuel that you have ready for us from rain and other moisture that may be precipitated upon it.

Yours respectfully,

THE WESTERN GAS CONSTRUCTION COMPANY.

By B. S. PEDERSON, *Agt.*"

The gas corporation is therefore officially notified that the defendant company will strictly require a fuel containing less than ten (10%) per cent of moisture, and the defendant placed its stamp of approval and acceptance upon the 3000 tons of bricks which the gas corporation at that time had accumulated for the purpose of the final test. The gas corporation, in pursuance of the defendant's request, covered this fuel so as to protect it from future rains and preserved it intact for the final test, at which time it was supplied to the defendant. We find the defendant in January and again in February operated its apparatus for a number of days making no complaint whatever concerning the fuel furnished, although the machine at no time produced anywhere near the minimum quantity of gas called for under the contract. On February 28, 1910, Mr. White caused the following letter to be written to the gas company [plaintiff's exhibit No. 16-B, Tr. p. 210]:

"Los Angeles, Cal., February 28, 1910.

Los Angeles Gas and Electric Corporation, Los Angeles, California.

Dear Sirs:

Attention, Mr. Luckenbach.

Further in reference to your letter to me of February 25th, I would beg to state that the chief engineer at the gas works raised the speed of the engine this morning, and increased the pressure to a satisfactory degree. It was my intention to go on with the test tomorrow morning, but we find that the carburetter has a coating over the top of it which it is essential to remove in order to get efficiency. Since perforating the back of the shoots, we get a large amount of fine stuff out before it reaches the mouthpiece of the generator. This condition has materially increased the efficiency of the fire, and for the two days operating since perforating the shoots the fire has built up.

Our company is desirous of having Mr. Pederson here during the test, but unfortunate he is north. He will be back on the 8th, and I ask you to give us until the 10th of March to start the test, promising you that we will positively start on that date, and that if Mr. Pederson returns earlier we will start before that date. Can notify him at once.

I trust that you will grant us this favor, and awaiting your reply, I am,

Yours very truly,

E. C. WHITE,

For Western Gas Construction Co."

The gas corporation acceded to Mr. White's request for a day's delay and on the same day Mr. White officially notified the gas corporation in writing that the final test of the apparatus would commence on the morning of March 10, 1910, said letter being as follows (plaintiff's exhibit No. 16-A, Tr. p. 210]:

"Los Angeles, Cal., February 28, 1910.

Los Angeles Gas and Electric Corporation, Los Angeles, California.

Gentlemen:

Attention, Mr. Luckenbach.

Further, in reference to your letter of February 25th and mine of even date herewith:

We hereby notify you that we will, on the morning of March 10th, 1910, at 6 o'clock a. m., begin the final twenty-day test of the water-gas set now at your plant, as provided for in the contract between your company and the Western Gas Construction Company, dated July 12th, 1909. Between this date and the morning of March 10th, 1910, we will not require carbon of any specific amount of moisture, but in operating the set will use the ordinary run of brick.

Yours respectfully,

E. C. WHITE,

For Western Gas Construction Company."

Although the defendant's agent, Mr. Pederson, tried to make the court believe during his testimony that the defendant was forced into the commencement of this final test and that the machine was not ready to commence the test at that time, Mr. White, who had charge of the machine and was the only representative of the

defendant who was present at the time the final test was commenced, stated that when he commenced the test on the morning of March 10, 1910, he considered the machine was in perfect condition for the commencement of the test, but that after the machine became stopped up during the test, he came to the conclusion that he had made an error in judgment. [Tr. p. 535.]

The defendant during the trial attempted to lay considerable stress on the point that the gas corporation rushed them into the final test at a time when the machine was not in a perfect condition ready for such a final test. But we call the court's attention to the fact that this apparatus had been installed at the gas corporation's plant since the fall of 1907 and that at that time the defendant company had received from the gas company practically three-fourths of the entire purchase price of the machine, and we submit that it is no wonder that the gas corporation in the spring of 1910, after a period of more than three years had elapsed, should have been rather impatient with the defendant for not commencing the final test of the apparatus. We call the court's attention further to the fact that under the written contract of April, 1907, the defendant agreed to construct the entire apparatus, ship it to Los Angeles from Indiana, install it here and have the apparatus in full working condition by the first of October, 1907, a period of six months. The contract of July, 1909, only provided for a few changes to be made in the apparatus, and yet we find that by the end of February, 1910, or in other words eight months after this contract was entered into, the defendant was

still tinkering with its apparatus and apparently no final test was even in sight. Faced with this condition of affairs, the gas corporation demanded that the defendant cease its endless delay and commence a final test of the apparatus. When this ultimatum was delivered by the gas corporation, the defendant sets its date for commencement of the final test as March 10th and its operator, Mr. White, states that on the morning of March 10, 1910, he felt that the machine was in perfect condition and he stated that the fires in his generator were in fine shape. [Tr. p. 569.]

(2) The Continuance of the Test.

On the first day of the test the machine made a large quantity of gas, but each day thereafter saw a decline in make until Mr. White concluded on the 15th day of March that by shutting down the machine for two days and thoroughly cleaning out the same, he could make more gas during the remaining days of the test, notwithstanding the loss of two days, than he could if he continued the operation of the machine without the shutting down and recleaning of the same. [Tr. pp. 573, 537.] The machine was accordingly shut down for two days, during which time the defendant relined the carburetor with new bricks. [Tr. p. 435.] On the 17th of March, the machine was again placed in operation and at 6 a. m. on the 30th of March, 1910, the defendant voluntarily and of its own accord ceased the operation of the machine. [Tr. pp. 557, 573.]

The defendant at the trial of the case attempted by two methods to escape the consequences of its ap-

paratus having made considerably less than 2,000,000 cubic feet per day during the test. The first method was by claiming that the defendant should be permitted under a custom which the defendant alleges was in vogue at the gas corporation's plant, to shut down the apparatus one day in seven for the purpose of cleaning out, the defendant's idea being that if it could persuade the court that it should be allowed these three days, that then the defendant could minimize the effect of their having lost three days during the test by reason of their shutting down and thus materially increase the average output of their machine. Uncontradicted evidence shows that this alleged custom of shutting down one day in seven (although the gas company's witnesses claimed that their custom was only to shut down one-half day in seven) [Tr. p. 704] was a custom which the defendant was not aware of at the time the contract of July, 1909, was entered into. And the undisputed evidence shows that the first time the defendant ever even suggested to the gas corporation that they were entitled to shut down the apparatus one day in seven was early in 1910 [Tr. p. 419], and the findings are and defendants admit [419] that when this matter was broached to the gas corporation, it absolutely refused to allow the defendant to break the continuity of the test. The contract of 1909 specifically states that the capacity of the apparatus is to be determined by a 20-day consecutive test. In other words, the gas corporation wanted to be sure that the defendant's apparatus would have a sustained capacity for at least 20 consecutive days. The evidence regarding the

gas corporation's custom of shutting down the apparatus from one-half a day to one day in seven, showed that it was a custom used in connection with apparatus which is kept in operation year in and year out [Tr. pp. 703-704], and the evidence shows that although this custom is followed by the gas corporation, yet in arriving at, or computing the gas-making capacity of their own apparatus, the period during which they are shut down each week is considered as a portion of the operating period. [Tr. p. 703.] The defendant admits that it never heard of this custom of shutting down once a week in any other plant in the United States [Tr. pp. 418, 491], and, since it did not know of this custom at the time the contract of 1909 was entered into, how can such a custom be read into this contract as a matter of law? The contract of July, 1909, specifically requires a "20 *consecutive days' test*" to be made, and since the gas corporation at all times refused to acknowledge that the defendant had a right to shut down the apparatus one day in seven, how could the court *as a matter of law* hold that the defendant was entitled to shut down its apparatus one day in seven? While the trial court in its findings did hold that such a custom was in vogue at the gas corporation's plant and that the shutting down of the plant one day in seven was a proper and usual practice, the court does not find that the defendant was entitled to shut down their apparatus one day in seven during such a final test as was required under the contract of 1909. Even if the court had so found, the only effect of the finding would be to raise the gas-making aver-

age of the defendant's apparatus during the final 20-day test to barely 2,000,000 cubic feet per day, but the defendant would still be left in the position of having failed to make gas using no more than 35 pounds of carbon and of having failed to produce a gas of at least 20 candles in quality, either of which failures are sufficient to require a judgment for the plaintiff.

(3) The Completion of the Test.

After having voluntarily ceased the operation of its apparatus on March 30, 1910, the defendant's representative called at the gas corporation's plant and asked permission to make a further and additional test of said apparatus and stated that if the gas corporation would either accept the apparatus in its present condition or would grant the construction company the opportunity to make another test, that the latter would then repair the apparatus (which was at the completion of the test in such a delapidated condition that an expenditure of approximately $1000 would have been required to even enable the machine to continue making gas) [Tr. pp. 368-370] and go on with its testing, but the defendant did not at this time claim that its 20-day test of which it gave the gas corporation notice on February 28, 1910, had not been fully completed.

This 20-day test, having been carried out from the 10th to the 30th of March, 1910, without objection, must be admitted to have been binding upon the defendant.

The finding of the court to the effect that a 20-day test of the apparatus such as was contemplated by the

contract of 1909 was not had, though worded in a manner which might be misunderstood, can have no other meaning except that such a test was not had because during the period from March 10th to March 30th, 1910, the gas corporation had not furnished the defendant with the quality of fuel required by the contract. The finding referred to cannot be construed to mean, and the evidence does not bear out the construction which the defendant may seek to make, namely, that the court meant that the machine had not been operated for 20 consecutive days. While the defendant claims that it should be entitled as a matter of custom to a credit of one day in seven for shutting down, they admit that they did not follow this custom [Tr. p. 418] and did not shut down one day in seven, and they do not claim that the three days during which they did shut down during the final test was such a shut-down as was customary in the operation of the gas company's plant. It is evident that defendant did not itself take a firm or certain stand on this proposition.

Conclusion.

In our specifications of error we have taken exception to a large number of findings; but we have not attempted to consider each of them in detail in our argument, because all of the adverse findings are based upon the finding concerning the fuel, and if the trial court was wrong in its finding concerning the fuel, we submit that the entire judgment must be reversed. We believe that we have shown that the plaintiff in every respect fully performed the contract upon its part, and

that the defendant failed to make its apparatus produce the minimum amount of gas of the quality or with the fuel economies specified. We believe that the adverse findings of the trial court were based upon a false premise, both in law and in fact, and that plaintiff was entitled to a judgment as prayed for.

Respectfully submitted,

WM. A. CHENEY,
645 S. Hill St., Los Angeles, Cal.
HERBERT J. GOUDGE,
307 Exchange Bldg., Los Angeles, Cal.
LEROY M. EDWARDS,
600 H. W. Hellman Bldg., Los Angeles, Cal.
Attorneys for Plaintiff in Error.

2

No. 2159.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Los Angeles Gas and Electric Company, a corporation,
Plaintiff in Error,
vs.
The Western Gas Construction Company, a corporation,
Defendant in Error.

BRIEF FOR DEFENDANT.

This is an action brought by the Los Angeles Gas and Electric Company, (herein designated the Gas Company), against The Western Gas Construction Company, (referred to as the Construction Company) to recover the sum of $26,823.45, fixed as a penalty for the alleged breach of certain warranties of capacity in a contract for the construction of what is known as an extended carburetter superheater water gas apparatus, together also with the expense of moving the apparatus from its premises. The Gas Company is a corporation

engaged in the extensive manufacture and distribution of illuminating gas in the city of Los Angeles and vicinity. The Construction Company is a manufacturer of gas generating machines with its factory and principal place of business at Fort Wayne, Indiana.

On the 8th of April, 1907, The Construction Company and The Gas Company entered into a contract whereby the Construction Company agreed to sell and the Gas Company agreed to purchase, the gas apparatus herein described, for a purchase price of $35,694.00, payable in various installments as the work progressed. The contract contained a limitation of five months time from the date of the contract within which to complete the construction of the apparatus. It was agreed on the part of the Construction Company, that the machine should have a capacity of from 2,750,000 to 3,000,000 cubic feet per day of twenty-four hours, using dry lamp black with an economy of not more than 32 pounds of dry lamp black per 1000 cubic feet of gas made, or 35 pounds of lamp black containing not more than 10% moisture per 1000 cubic feet. The Construction Company also guaranteed that in making such gas, not more than 4½ gallons of crude oil of 17 degrees Baume, or over, should be used per 1000 cubic feet, of gas, and also guaranteed to make a good commercial gas, well fixed and non-condensable, of from 20 to 22 candle power, at the above rate per day. Elaborate specifications for the construction of the different parts of the apparatus were embodied in the contract and the same are set forth in full, in the complaint in the action, and will be found in the record, at pages 9 to 33.

The Construction Company proceeded with the work of installing the apparatus, but considerable delay ensued, due, as the Construction Company claims, to the fault of the Gas Company, and as the Gas Company claims, to the fault of the Construction Company. On account of this delay, the machine was not completed and ready for operation until the early part of 1908, and after the same was put in operation, the Gas Company refused to accept it upon the grounds that it had not the capacity and efficiency prescribed in the guarantees. On the other hand, the Construction Company claimed that it had fully performed the contract, and contended that the apparatus was fully capable of generating and manufacturing the quantity and quality of gas provided for, and with the economy of fuel and oil specified in the guarantee.

In the meantime progress payments had been made by the Gas Company to the Construction Company, to the amount of $26,823.45 and when this controversy arose, with respect to the capacity of the apparatus, the Gas Company brought suit against the Construction Company for the rescission of the contract and the recovery of the moneys it had paid. The Construction Company filed a cross-complaint for the recovery of the balance due upon the contract, and the litigation was pending many months, but was never brought to trial. In the month of July of 1909, negotiations were opened between the parties for a settlement of the controversy, and on the 12th of July, of 1909, a supplement to the original contract was entered into between the parties by way of compromise, whereby it was agreed that the

Construction Company should be given an opportunity to make a preliminary test of the apparatus for the purpose of determining what changes it desired to make in the same in order to put it in a proper condition for a final test, and among the changes which it agreed to make, was the construction of a new generator, or generators; also providing means for the collection and removal of dust and fine carbon, carried from the generator to the carburetter, and providing ample and satisfactory means for scrubbing and condensing the gas. After these preliminary tests and the changes in the apparatus were made, the apparatus was to be subjected to a twenty consecutive days' test, for the purpose of determining its capacity. If it showed a capacity of 2,000,000 cubic feet per twenty-four hours, with the same economy of oil and lamp black as provided in the original contract, the purchase price was to be $26,000.00. If it showed a capacity of 2,750,000 cubic feet per day, defendant was to receive the original purchase price of $35,694.00, and if it developed a capacity ranging between those figures, a proportionate sum, based upon the prices mentioned. This contract is also set forth in the complaint and will be found on pages 39 to 43.

A few weeks after the contract was made, the Construction Company started the preliminary test for the purpose of determining what changes to make, completing those tests sometime in the middle of August. Thereupon it shut down the apparatus and proceeded to make the changes. A new generator was constructed and various other extensive changes made, at an expense of over $8000, but it was not until the early part of 1910,

that the apparatus was in condition to be operated, preparatory to the test. Some delays then resulted from two explosions that took place upon the premises and interferred with operations, causing some damage to the apparatus and considerable delay. In the latter part of February, however, it was insisted on the part of the Gas Company that the test should be started on the 1st of March, 1910, but the Construction Company insisted that it was not ready, and requested additional time for balancing the machine and getting one of its expert operators upon the ground. The Gas Company consented to an extension of 10 days, only on condition that no further extension should be requested and that the final test should commence on the 10th of March. The Gas Company was, of course, in a position to enforce this ultimatum, for the reason that it controlled the supply of fuel, the operators and the premises, and accordingly, notwithstanding the fact that the apparatus was not ready, the test was begun on the morning of the 10th of March, 1910, at 6:00 a. m. The first day the apparatus produced more than 2,700,000 cubic feet of gas, although the fuel consumption was in excess of 35 pounds of lamp black per 1000 cubic feet. The second and third days considerably more than 2,000,000 cubic feet of gas was made, but the fourth day the make dropped below 2,000,000 cubic feet. It being manifest from this rapid decrease in production that something was radically wrong with the machine, it was closed down on the 14th and the discovery made that the carburetter had become almost entirely clogged by a deposit of fine carbon or lamp black, which blew over from the

generator into the carburetter. It took three days to clear this condition and then on the seventeenth, when operations were renewed, the condition of the fuel furnished for use in the generator was so decidedly impracticable for use (as we shall hereafter show), that the make on that day was only a little in excess of 2,000,000 cubic feet. On the succeeding seven days, the apparatus maintained a production of more than 2,000,000 cubic feet per day, but the carburetter again became clogged, as a result of the impossible condition of the fuel, (as we shall presently show), and the production decreased rapidly until, on the last day of the test only 1,280,000 feet were made. (See findings, XII to XVII, pages 779-785.)

At the expiration of twenty days from the time the test started, to wit: on the 30th day of March, the Gas Company refused to permit the apparatus to be any longer operated, declaring that it had failed to fulfill the guarantee and demanded the return of the $26,823.45. The Construction Company took the position that there had been a substantial performance of the guarantees, notwithstanding the impossible conditions under which they had operated; that the result of the test had shown that the apparatus had a much larger capacity than 2,000,000 cubic feet per day; but that the conditions under which they had operated and particularly the unfit character of the fuel furnished, had rendered a practical demonstration of what the apparatus was capable of doing, utterly impossible. Defendant offered to proceed with another run under favorable and proper conditions, and abide by the result, but the Gas Company absolutely

refused to accede to the request, or permit any further demonstration whatever. Thereupon this suit was brought and the issues tried before His Honor, Judge Olin Wellborn, without a jury.

The case turned upon the issues raised by the pleadings, as to whether or not the fuel supplied by the Gas Company conformed to that which the Construction Company had contracted to use in the apparatus. On the part of the Gas Company, it was claimed, first, that they were not bound by the contract to furnish the lamp black in any particular form, so long as it contained less than 10% moisture; and secondly, that even if it were required to furnish the material in the form of substantial bricks suitable for consumption in the generator, that they did in fact comply with the requirements by furnishing the material in the form of bricks, containing less than 10% moisture, and as substantially and compactly bricked as reasonable skill and care would permit.

On the other hand, it was the position of the defense, that by the terms of the contract, read in the light of all the surrounding circumstances, it was contemplated that this material should be used in the generator, only after it had been dried to a moisture content of less than 10%, and then substantially bricked, so that its consistency would be such as to insure its reaching the generator in reasonably good shape; that as a matter of fact the fuel that was supplied during this test, had been utterly ruined, so far as the stability of the bricks was concerned, by the application of external heat for the purpose of driving out the moisture after bricking the material; that this course was pursued notwithstanding the

protests of the operators of the Construction Company throughout the test, and the result was that the bricks crumbled and pulverized to such an enormous extent, that it was utterly impossible to maintain the fires in such a condition as to produce anything like the quantity of gas, which the apparatus, under normal conditions was capable of producing.

The learned judge of the lower court adopted our view of the construction of the contract in this regard, and indeed it was practically conceded at the trial that that was the proper construction of the contract, and after hearing the testimony of many witnesses on the question of the character of the fuel and the condition in which it was furnished, found as a fact from all of the conflicting testimony in the record on the subject, that the bricks in the form in which they were furnished, were lacking in stability to such an extent as prevented the possibility of any such test as was contemplated by the parties and provided for in the contract. It necessarily followed from this, of course, that there had been no test and consequently that plaintiff was not entitled to recover the penalty fixed by the contract. It followed also, that in the absence of such a test as the contract required, the real capacity of the apparatus was not ascertained, and the court concluded that the defendant was not entitled to recover on the cross-complaint, and therefore that neither party take anything against the other. We propose to show that the findings of the court upon this vital issue of fact, as to the condition of the fuel, and whether there was such a test as was called for by the contract, are amply supported by the

evidence; but before adverting to the testimony upon which we rely to support those findings, we think it will be first profitable to call attention to the terms of the contract and to the conditions under which it was made and the objects to be accomplished, in order that the true meaning of the contract may be fully understood.

Under the contract of July 12, 1909, the Gas Company was obligated to co-operate with defendant in providing proper conditions under which the final test should be made, and especially to provide the lamp-black fuel bricked in a manner practicable for use in the generator.

Lamp black according to the proper dictionary meaning of the term is chemically pure carbon.

According to the literal interpretation of the contract, therefore, the Gas Company had no right to furnish any other material for fuel purposes than chemically pure carbon in the form of lamp black. The lamp black, however, which was produced at the Gas Company's plant, and furnished throughout this test was not chemically pure lamp black. It is a biproduct of their oil gas generating machines, and contains anywhere from ten to fifteen per cent of tar or other hydro carbon impurities, and a similar percentage of noncombustible ash, and which substances substantially diminish the gas making efficiency of the fuel. (Finding 16, page 781, 782.)

According to the strict letter of the contract, therefore, the Gas Company had no right to furnish this biproduct of their oil gas manufacture as a substitute for chemically pure carbon in the form of lamp black, but the Gas Company at the trial offered in evidence the

correspondence which took place between the parties during their negotiations for the contract to prove that the parties had in mind this byproduct of the oil gas generators when they used the term lamp black. Testimony was also offered that lamp black is the term customarily used among persons in the gas trade to designate the by-product of the oil gas machines. From this evidence the court found, (and properly no doubt), that the term lamp black as used in the contract had reference to the material which commonly passed by that name in gas plants and which was being produced at this plant, and not chemically pure carbon.

We have no criticism to make of that finding nor of that interpretation of the term as used in the contract, but we also earnestly contend, and the court has so found, that the term lamp black fuel as used in the contract should also be interpreted to mean material of that character bricked in a form suitable for use.

Read in the light of the circumstances surrounding the parties and of the correspondence offered by plaintiffs for the sole purpose of explaining the meaning of the term "lamp black," we are confident that no other conclusion can be reached than that reached by the court below, that is, that the parties intended that this lamp black material should be furnished to the construction company during the test after it had been reduced to a moisture of ten per cent, and then compressed in the form of substantial bricks which would hold their shape in the fire bed to at least the extent of preventing packing and smothering of the fire.

A general understanding of the process of the manu-

facturing of water gas would make it manifest that any other construction would reduce this contract to an absurdity. Water gas is produced by bringing water in the form of steam in contact with a mass of carbon heated to a very high temperature. When this takes place the water is decomposed into its constituent elements of oxygen and hydrogen. The oxygen combines with the carbon in the proportion of one atom of carbon to one of oxygen and forms carbon monoxide gas (CO). This carbon monoxide gas mixed with the hydrogen of the water which is liberated in the form of gas is what is known as water gas. The apparatus which comprised the water gas set covered by this contract consists of five different units, the generator, the carburetter, the superheater, the condenser and the scrubber. The generator described in the original specifications was cylindrical in form, thirteen feet in diameter and twenty feet high. The generator constructed under the supplemental contract of July 12, 1909, was oval shaped, thirteen feet in diameter at the narrowest place, twenty feet across the longest section, and twenty feet high. It was however, divided into two compartments making practically what is called in the testimony "twin" generators. In the bottom of the generator are what are known as the "grate bars" which correspond to an ordinary grate in an open fire. It is in this shell that the fuel is ignited and brought to an intense heat. The heat is maintained by the introduction of air under pressure during what is known as the "blast period." When the machine is in normal operation the blast continues for about six minutes, and then the generator is closed, and steam is

sprayed into this incandescent mass of carbon, and is converted into water gas. This is called the "make" period, and also continues for about six minutes.

But water gas is nonluminous. It burns with a pale blue flame like that of an alcohol lamp. It is unfit, therefore, for use as illuminating gas, and to render it commercially adapted for that purpose it is enriched by mixing it with a hydrocarbon illuminating gas made from oil. This enrichening gas is generated in the carburetter, which is also a large steel cylindrical shell connected with the generator by proper valves and pipes. The interior of the shell is lined with fire brick, and in addition the entire interior is filled with fire brick laid criss cross or checker fashion so that throughout the interior, interstices exist between the bricks so as to admit of the passage of the products of combustion. The fire bricks in the carburetter are heated during the blast period by the burning of the gases generated in the generator during the blast period. What is known as "producer gas" results from the combustion which takes place during the blast period, and is carried over in the carburetter, and there ignited and the bricks heated by means of this combustion. The fire brick in the carburetter are brought to a very high temperature, and then during the "make" period petroleum oil is sprayed into the carburetter and when it comes in contact with the bricks heated to a white heat the oil is converted into hydrocarbon gases of high candle power, and this gas forms about one-third of the ordinary commercial illuminating water gas. The enriched water gas thus formed, however, is not sufficiently stable for distribution for

commercial uses. It requires "fixing" before being adapted for that purpose. This is accomplished in the superheater which is also a large cylindrical shell corresponding very closely in size and construction to the carburetter. The fire brick or checker brick in the superheater are also heated by the combustion of unconsumed producer gas generated in the generator during the blast period. In other words, the combustion in the carburetter is regulated in such a manner as that all of the producer gas is not there consumed and the excess passes over into the superheater, where in that shell a secondary combustion takes place which raises the temperature of the brick in the superheater to a sufficient degree to "fix" the gas when it passes from the carburetter through the superheater; thence into the condenser where the moisture in the gas is eliminated. And thence the gas is passed into the scrubber and further purifying apparatus before it reaches the holder for distribution.

In this inquiry with respect to the character of the fuel of course we are principally concerned with the generator and the processes there carried on.

All of the expert gas operators testified, and indeed it is a self evident fact, that it is utterly impossible to maintain the proper heats in the generator, or to bring the steam properly in contact with the carbon, unless the fuel bed lays in a loose and porous condition.

Mr. Pederson who was one of the Construction Company's expert operators during the test, and who qualified as a man of large experience in the gas business, testified that it was indispensable to have a more or less uniform fuel as near as could be as to size, and he ex-

plains that in this generator the fire bed was carried to a depth of eight to ten feet; that it is necessary to have fuel of uniform size in order that interstices may be left in the fuel bed through which the air and steam may pass, and thus be brought in contact with the largest possible carbon surface.

Q. (By the court.) "You want bricks then of uniform size—or the fuel whatever it is of uniform size?

A. The fuel whatever it is should be of uniform size, and of such consistency as to retain that shape in the fire until it is consumed; it won't retain that size, but the gradual combination of carbon and oxygen reduces the size of the lump so that by the time it reaches the grate bars it is very much smaller, but not entirely consumed." [Tr. 410, 411.]

The same idea is explained by Engineer Guldlin who testified for the defendant, and it was demonstrated by him that charging the generator with a fuel that would pulverize or crumble would not only have the effect of packing the fire bed so as to render it impossible to bring the oxygen of the air and the steam in contact with a sufficient quantity of carbon to produce anything like satisfactory results, but such packing also had the effect of making it necessary during the blast period to increase the blast pressure in order to get the air through the fire bed at all, and when it was gotten through at the increased velocity that this packing of the fire made necessary, it would unavoidably carry abnormal quantities of fine dust over into the carburetter, and thus destroy the efficiency of that unit also. (Testimony of Guldlin, pages 608, 609.)

Mr. White, another expert operator, who testified for

the defendant, advanced a similar opinion (page 548), as did also Mr. Pederson (page 523).

Indeed plaintiff's witnesses themselves would not question the logic of this proposition, although they did lay some stress on the fact that in the operation of three small water gas generators in their plant it had been their custom at times to use the lamp black in the form of lumps of varying sizes. Their practice had been at times to spread the material over the ground and let it dry, roll it and then plow it up and use the lumps in their water gas machines; but while we do not deny the possibility of making water gas under such conditions, the established fact is that it is utterly impossible to obtain anything like the approximate capacity of a water gas machine unless the fuel is charged into the machine in an approximately uniform shape and of a quality sufficiently durable to hold that shape in the generator. The records of the capacity and economy of their own machines furnish a sufficient demonstration. They have four gas sets and they consume anywhere from thirty to sixty pounds of carbon per thousand feet of gas, and all four machines output only in the neighborhood of a million and a half cubic feet per day. [Tr. 392, 393.] See also Creighton's testimony, page 702, 703.

And no better illustration of the disastrous effect of attempting to use a fuel that has a tendency to disintegrate or pulverize in the generator could possibly be furnished than what developed in this apparatus during this final test. We shall hereafter show that approximately one-third of all of the fuel that was charged into the generator crumbled up and was pulverized to such

an extent that it was utterly impossible to maintain anything like a uniform fire. That almost throughout the entire operation large masses of unignited carbon existed in the center of the fire and in order to get air through it at all it was necessary to blast the same under such pressure that large "blow holes" constantly appeared in the fire bed, and enormous quantities of the fine and pulverized dust was blown over into the carburetter with the result that it clogged up in the first three days operation, rendering it necessary to cease operations and replace the checker brick; that after resuming operations the same condition prevailed, and again toward the end of the test the carburetter was practically incapacitated.

So that to say that the parties when they used the expression "lamp black fuel" in their contracts should have had in mind the use of that material in a crumbly or friable condition or any other form than that of brick substantially compressed, is inconceivable. It might just as well be said that they intended by the use of the term that chemically pure carbon in the form of lamp black should be used. Such a construction would render the contract unreasonable and impractical, if not utterly impossible of performance. Such a construction should never be adopted when a different interpretation would render the contract fair and just, and is equally consistent with the language of the instrument. Or as stated by Mr. Justice Shaw in Stein v. Archibald, 151 Cal. 220:

> "It is a well stated principle applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair or unusual or extraordinary, and another construc-

tion equally consistent with the language would make it reasonable, fair and just, that the latter construction is the one which must be adopted. It is also a principle of construction with respect to ambiguous contracts that the circumstances surrounding and known to both the parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed." (*Id.* 223.)

Again, in the language of Circuit Judge Sanborn in Leschen etc. Company v. Mayflower etc. Company, (C. C. A. 8th Circuit):

"Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful so that the contract is fairly susceptible of two constructions, one of which is fair and such as prudent men would naturally execute, while the other makes it inequitable, unusual and such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it unusual, unfair and improbable contract."

Leschen etc. Co. v. Mayflower etc. Co., 173 Fed. 855.

Moreover, in view of the indefinite expressions in the contract with respect to the character of the fuel to be used, and the manner in which it was to be furnished, we have a right to look, and it is our duty to consider, the correspondence and negotiations that took place between the parties at the time the contract was made, and when we do look at the declarations of the parties themselves as contained in this correspondence there cannot be the slightest doubt left in the minds of any one that it was

intended that this lamp black should be furnished by the Gas Company in the form of substantial bricks, made after the material had been dried to a moisture content of 10% or less. We suppose that counsel for appellant will agree that it is proper to consider this correspondence for the purpose stated because the letters to which we refer were introduced by themselves for the avowed single purpose of supplying the information lacking in the contract as to what the parties meant by the expression "lamp black fuel."

If, however, there could be any doubt of the propriety of considering this correspondence for the purpose stated, we have abundant authority to sustain our position.

United States v. Bethelem Steel Company, 205 U. S. 105;

Balfour v. Fresno Canal Company, 129 Cal. 221;

Seitz v. Brewer Refrigerating Company, 141 U. S. 510, 35 L. Ed. 837;

Kilby Manufacturing Company v. Hinchman Fire Proofing Company (C. C. A., 8th Cir.), 132 Fed. 957;

S. M. Hamilton Coal Company v. New York Coal Company, (C. C. A. 2nd Circuit) 160 Fed. 75;

Stoops v. Smith, Mass. 97 Am. Dec. 76;

Garfield etc. Company v. Pennsylvania Coal Company, Mass. 84 N. E. 1020.

For the purpose then of ascertaining the intent of the parties, we may turn to the correspondence out of which the guaranties in this contract grew, and which corre-

spondence as we have before stated were introduced by plaintiff's counsel for the single purpose of ascertaining what the parties meant by the term "lamp black." (See counsel's statement of the purpose of offering this testimony, page 160, pages 184, and 188.)

First is a letter from Mr. Pederson as the agent for the construction company to the gas company, dated February 20, 1907. It shows that the gas company was negotiating for an apparatus for the manufacture of water gas from lamp black fuel. It shows that the use of lamp black fuel for that purpose was a new experience to the construction company, but "being" pure carbon the supposition would be that it would make an ideal fuel. (Page 161.) The next is a letter from the gas company to the construction company, dated March 5, 1907. In that letter Mr. Luckenbach, the manager of construction, gives a clear and full statement of all the conditions upon which the guaranties are to be based and the machine operated. In this letter Mr. Luckenbach solicits a guaranty to accompany their proposal and states:

> "*In order that no misunderstanding may occur* the carbon to which we refer is a bi-product from the manufacture of oil gas with which you are undoubtedly familiar. The way we are handling this at present is: We convey it from the wash box by flume to settling pits where the water is drained off and then the carbon is either passed through a drier or hauled into piles and sundried, and then made into bricks or taken in large lumps from the pile and put into the generator.
>
> "We are now negotiating for the purchase of a drier to handle all of our product and anticipate that this drier will turn out our carbon with from 5%

not to exceed 10% of moisture. *After passing the drier the same will be bricked for use in the generator.*"

Again on March 11, 1907, Mr. Guldlin, president of the construction company, wrote acknowledging receipt of the letter of March 5th, and expresses his surprise that the lamp black could be used in the generator in the form of lumps from a sun dried pile "as the writer would hardly believe that the fuel would be compact enough to retain its shape in a fuel bed by having merely been sun dried. * * * The natural inference would be that the lumps would crumble up and pack over the grate and in the lower part of the fire." (*Id.* page 166.)

This shows beyond question a clear understanding of the necessity of having a compact brick in order to get the best results, and this letter in connection with the letter of March 5th, shows conclusively that all parties understood that the guaranties were based upon the distinct understanding that the fuel was to be furnished in the form of bricks, and of substantial character, and made after the material had been dried to 10% or less of moisture.

Besides that the evidence shows that samples of the material had been submitted by the gas company to the construction company, and impliedly of course, it was understood that the quality of fuel to be used would be equal to the sample. Mr. Pederson testified that during the negotiations Mr. Luckenbach explained that the gas company was at that time briquetting the lamp black for commercial use, and that they were contemplating the installation of apparatus to dry out the lamp black, and

that they would then brick the material and furnish it to the construction company for use in the machine.

> "I asked him if they had any of it on hand so that we could determine the quality of it, and he told me that they had down to the gas works, and he told me that I could go down and see Mr. Millard, the superintendent, and he would show me samples of the material they intended to use, but not in the shape. He would show me the quality.
>
> Q. Did he tell you what difference there would be or might be in the shape as compared with the sample shown you?
>
> A. He did. He said they contemplated putting in a machine to make a brick form rather than a briquette, but they contemplated this bricking machine for that purpose, and contemplated purchasing it for that purpose." (*Id.* pages 402, 403.)

The term briquette is used by the witnesses to designate the lamp black material as it is compressed for sale commercially as a domestic fuel. It is about the size and about the shape of a small drinking glass, while the material as it comes from the brick press is about the size and shape of an ordinary building clay brick.

Again Mr. Pederson testified that he did obtain samples and made inquiries about them in order to form an opinion whether his company could handle the material in such a machine. After obtaining the sample he took the matter up again with Mr. Luckenbach

> "and Mr. Luckenbach emphatically wanted it understood that we should have a certain quality of fuel in making this contract and getting results, and I think he said, 'I do not want you to come back and say afterwards that we promised you bricks such as you have seen down there and have obtained, but we are installing a bricking machine and that will be the form of the brick, but it will be the quality

> that you saw down there. It will be such fuel as that but in a different shape,' and says to have this absolutely without any misunderstanding, we had better write it down. I think he then wrote this letter (the letter of March 5th) to confirm his conversation with me." (*Id.* page 407, 408.)

He then explains that he forwarded both the letter and the samples of briquettes to the home office at Fort Wayne, and he explains further that a careful examination of the briquettes were made by him as to their stability; that they were hard and substantial and could not be broken by striking them together in an ordinary manner or dropping them on the floor "whereas I doubt if there was a brick supplied us during the test that would stand a drop of four or five feet from the ground." He also explains that the guaranties were based exclusively upon the information contained in the letter of March 5th, and what he learned concerning the quality of the fuel in the investigations which he made. (Page 410.)

Mr. Guldlin, the construction company's president, also explains that their guaranties in the contract were made in view of the same information. (Pages 603, 604.)

In view of this correspondence and of these representations and the facts that were then before the parties when they made this contract, can there be the slightest doubt that the parties intended by the use of the term "lamp black" to mean lamp black supplied in either the form of a briquette or a brick solidly compressed after the material was dried to a proper degree of moisture?

Those things that are necessarily or properly implied in a contract are according to well settled principles of law just as much a part of the contract as the agreements expressly set forth therein.

> "The stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention." (C. C. § 1655.) (Also C. C. § 1656.)

Mr. Justice Lorrigan in

Acme Oil Company v. Williams, 140 Cal. 681,

in which case there was involved an oil lease which was silent on the subject of whether there was any obligation on the part of the lessee to diligently pump the oil developed, said:

> "Since the one consideration for the execution of oil leases is the share in the product which the lessor, either in kind or as royalty, is to receive, it is necessarily implied as of the essence of the contract that the lessee shall work the wells with reasonable despatch for their mutual advantage. It is not necessary that technical words should be inserted in such a lease in order to raise the condition. If a reasonable and fair interpretation of its terms shows that it was made to depend upon doing something essential to its object and purpose, the law implies the condition to attain that end." (*Id.* 685.)

Approved:

Payne v. Neival, 155 Cal. 46; also

McIntosh v. Robb, 4 Cal. Appellate 486.

II.

Plaintiff was entitled to recover nothing in this action for the reason that no test of the apparatus was ever had under the conditions prescribed in the contract, particularly in this: that the Gas Company failed to furnish the lamp-black fuel in a condition reasonably fit for use.

The contract of July 12th provided for a test of this apparatus under the conditions therein prescribed. The rights of the parties were made to depend upon that test. One of the obligations of the gas company, as we have shown, was to furnish to the generator lamp-black fuel in a form reasonably adapted for the purpose intended. Compliance with all of these obligations was a condition precedent to the right of recovery of the penalty mentioned in the contract, to-wit, $26,823.45.

The burden of proof of compliance with these requirements and the burden of proof of the breach of the warranties on the part of defendant rested upon the plaintiff.

Buckstaff v. Russell, 151 U. S. 626, 632;
Arkwright Mills v. Aultman Machinery Company, 145 Fed. 783.

The plaintiff sought to discharge this burden by introducing the correspondence which showed what the parties actually meant by the use of the term lamp-black; by proof that the test commenced on the 10th day of March, 1910, and ended on the 30th of March; that the record of gas actually produced showed less than 2,000,000 cubic feet per day; that the record of fuel consumption was greater than thirty-five pounds

per thousand, and that the candle power maintained during the test was less than twenty. Evidence was also introduced that the lamp-black was also furnished in the form of brick; but their own evidence shows that the lamp-black bricks furnished to this apparatus had been prepared from lamp-black which contained anywhere from fifteen to twenty-five per cent of moisture; that the bricks had been exposed to the rain for a considerable period, and then when the test started had been subjected to intense external fire-drying so that the moisture in the brick had been driven out, leaving them porous and fragile, although their operators do pretend in their testimony that the bricks were reasonably strong.

However, this question of the character of the bricks (and it is indeed the turning point in the case) was solely and exclusively a question of fact, and the lower court had the witnesses before it, heard all of the conflicting testimony upon the issue, and made the following finding:

> "But the said bricks so furnished had been prepared by being compressed with moisture largely in excess of 10%, and the moisture then driven out leaving voids therein, and had been insufficiently compressed, and were so unstable that they were not able to withstand, and did not withstand the jarring necessarily incident to handling the same for fuel purposes in such apparatus. Notwithstanding the protests of the defendant during said test. plaintiff did furnish to defendant bricks which had been and were being throughout the entire test, subjected to external artificial heat or kiln-drying for the purpose of driving out moisture therefrom, and did also furnish considerable quantities of bricks which were still warm from said fires, which ren-

dered them unstable and easily distintegrated and practically all the brick furnished to defendant during said test were of such an unsubstantial character that great quantities of them were necessarily broken up and crumbled in the handling of them, and that this crumbling and powdering took place to such an extent as that great quantities of fine pulverized and crumbled material unavoidably found its way into the generator, with the result that the fuel bed was packed and its efficiency largely impaired, and with the further result that excessive and extraordinarily large quantities of dust were blown over from the generator into the carburetter, and tended to form a deposit upon the brick work in the carburetter, and to materially retard its function and impair its capacity.

"Throughout said test plaintiff continued to supply bricks of the character above described, to wit, so entirely lacking in firmness and stability as that practically all of them broke more or less in handling, and great quantities crumbled and pulverized to such an extent that at times more than one third, and almost constantly as much as 15% or 20% was screened out as waste, and at least as much more unavoidably went into the generator with the serious detrimental effects above described."

See finding .... and also finding XII, p. 779.

That these findings find ample support in the testimony and indeed that no other conclusion could be reached from the testimony presented is, we think, sufficiently established by reference to the testimony of Messrs. Pederson and White alone, although plaintiff's own witnesses went far toward establishing practically the same condition of affairs described by these two witnesses. Mr. Pederson testified that the kiln dried bricks were full of fissures, and these fissures were so wide and open that it would be a matter of very little difficulty in

tearing the bricks apart. He describes the charging apparatus and shows the manner in which the fuel was handled. It was hauled for a few hundred yards in wagons to the charging apparatus. The wagons straddled a pit, and the bricks were dumped from a wagon down to a platform in the pit a distance of four or five feet. From there it was dumped into a skip a distance of two or three feet and was then hoisted to the top of the building where the skip or bucket was tipped over, and the bricks allowed to shoot down into the upper bin and collect there, ready to be discharged into the generator through another chute which was also built on an incline and afforded a slide to the generator. (p. 427.)

Now, this slide or chute leading to the charging door of the generator was perforated on the bottom by slits about three feet in length and about an inch and a half wide and three or four inches apart; that is, they were in series of intervals of about six or eight inches and three or four inches apart. [White's testimony, pp. 569, 570.]

Mr. White perforated this chute in this manner just a short time before the test began, in order to sift out the dust in the carbon, and the broken pieces, which, if they were allowed to pass into the generator, had a tendency to pack the fire; but this chute was necessarily on quite a steep incline, and the testimony shows that while these perforations had the effect of eliminating a large quantity of the fine material that otherwise would have gone into the generator, yet that unavoidably great quantities found their way into the generator, with the disastrous results that we have described.

As said before, the bricks that were delivered to this generator had been made several months previously and had been stacked on the premises and subjected to air-drying, but nevertheless, on account of the moisture which they had absorbed from rainstorms, and on account of the fact that they had been bricked from material that contained anywhere from fifteen to twenty-five per cent of moisture, practically all of them contained more than ten per cent. at the time of the test. [Page 255.]

In December of 1909, while Mr. White was experimenting with the apparatus to ascertain the quality of brick most desirable to use, the question arose as to whether it would not be advantageous to use a brick containing more than ten per cent. of moisture. Mr. Millard, the gas company's superintendent, urged the construction company's operators to use such brick, claiming that it gave better results and held its shape more satisfactorily than a drier brick [p. 511].

Mr. White was at first disposed to adopt this suggestion, and accordingly, on December 13, wrote the gas company that he "preferred, if it was agreeable to the gas company, to use bricks for the new machine containing, say, from sixteen per cent to twenty-five per cent. moisture, instead of ten per cent., as formerly" [p. 207].

After some experimenting with these bricks, when Mr. Pederson arrived upon the ground, and after an unsuccessful effort was made to get credit in weight for this excess moisture in the fuel economy calculation, this request was revoked, and the announcement

made by letter of December 28, 1909, that while the fuel which the gas company had on hand was satisfactory, yet, "We feel that it must be protected from additional moisture, and would ask that you protect the fuel that you have ready for us from rain and from moisture that may be precipitated upon it" [pp. 207, 208].

The gas company's employees testified that they did make efforts to protect it by covering it with tarpaulin and other material, but nevertheless it was admitted that before the time for the test arrived, considerable moisture had been absorbed, so that the moisture content was largely in excess of ten per cent.

To correct this condition, the gas company, without the consent of the construction company, piled the brick in kilns and built immense fires around them so as to drive out the moisture. (Luckenbach's testimony, pp. 289, 290.) And this kiln-drying process continued throughout the test in spite of the protests of our operators, as we shall hereafter show.

There is a conflict in the testimony as to the effect of this kiln-drying. Messrs. Creighton, Young and the chemist, Wade, of the gas company, claim that the kiln-drying process had no detrimental effect, although Mr. Creighton admitted that the fire-dried brick did crumble to some extent. (p. 388.) But, on the other hand, our witnesses, particularly Mr. Pederson and Mr. White, one or the other of whom was there on the ground constantly, and who observed their action at all times, testified positively that the fire-drying totally destroyed the stability of the brick, and the court below believed them.

Mr. Pederson testified that when he reached Los Angeles on the 12th of March, he observed the character of the fuel, and it was so poor that on the 13th it became apparent that so much fine dust was blowing over into the carburetter that it would be necessary to shut down and clean it out. After re-starting the machine, the fuel was equally bad, if not worse.

> "We found considerable dust going with it, and began to have fire trouble. We did not seem to be able to get fuel for any length of time that we could depend on at all. Occasionally they would give us a load that was fairly good—better than the other fuel, but we found it was in poor condition generally. After the protest on the 18th of March, we had a few loads of a little better brick, and about the time we would think we were getting the fire along in a little better shape, they dumped a load of this other stuff and it ruined our fire again." (P. 437.)

Mr. Pederson then describes the appearance of the fire, and describes the holes that the blast would cause in the fire bed on account of its being packed and smothered. He says:

> "That is a condition that will occur with fuel of that character. The blast will work on one spot and may find one opening. It is always working to find an opening through the pile and after it has obtained an opening it will blow that place clean of dust for a time and it will make an aperture for the steam to come through. The steam follows the same course. Then, naturally, the surface being small and the quantity of steam large, it quenches the fire at that point and develops what we call a black spot in the fire. When that does appear, it means that we are passing great quantities of steam through an opening but not getting the efficiency of

> the machine or the fuel. It is a condition that must be remedied immediately. As soon as the black spot is observed we remedy it by trying to pour more fuel in, and closing it up and diverting the steam to other parts of the fire." (*Id.* 439.)

A written protest was made by Mr. White on the 18th of March, to which we will refer hereafter, and Mr. Pederson testified that after that protest

> "there was something said about giving us a different fuel, and the gas company did give us different fuel for a short time. But it gradually became worse and worse, and while they would shoot in a load of a little better fuel, the general conditions were not much better than they were before—the average condition."

Mr. Pederson then testifies that not only did they supply this kiln-dried, porous and unsubstantial fuel against their protest, but they even went so far as to take the brick directly from the kiln, before they had cooled off, and supply them to this machine. Such brick, according to Mr. Pederson, could be made to fall apart by simply squeezing them.

> "It seems the characteristic of the fuel was that while it was hot it had a tendency to fall apart by its own weight, almost, or at the lightest touch."
>
> "Q. To what extent were these bricks delivered there?
>
> "A. I should say at that time (referring to the 18th) probably fifty per cent. of the bricks delivered were these freshly heated bricks, or not cold bricks, but warm bricks." (pp. 440, 441.) (See also p. 514.)

Mr. Pederson, asked as to the quantity of this porous, unsubstantial fuel that went into the generator, said:

> "Different quantities of the same fuel each day, and some days it would be abnormally bad and we would get more of this dust over, but just to what per cent. I would not be able to say. It would be, I should judge, about the same per cent. that the waste carbon would show to the carbon delivered. It would approximate the same."

Mr. White is even more emphatic in his denunciation of the poor condition of the fuel and the disastrous effects of it. He said that kiln-drying of the bricks undoubtedly destroyed their tensile strength and they went to pieces very rapidly and easily. The would not stand handling:

> "The principal and most percetible observation of their breaking was from the time they left the hole down in the ground and got on the chute—became dumped over. And they had a severe fall from there down to get into the bottom of the bin that connects into the chute. They came tumbling over each other and rattling down and hitting that plate and bouncing over each other. That is where the severe strain was on the brick. It knocked them all to pieces." * * * "The dust was something terrible. You could not recognize a man while you were standing two feet from him. It was an awful mixture of dust from the fire and dried kiln-dried bricks. The dust they formed was like you take a dusty street with a dozen horses stampeding. It was awful, awful fierce." (pp. 54, 55).

A considerable part of the broken material and fine stuff went through the chute and there was a great deal went into the generator.

> "I should say that the men would not be able to catch one-half of the fine dust that went into the

generator, not counting the broken bricks. It was exceptional that a whole brick ever went in. They were generally broken in two. But if they were all like that we would not have complained—if they had held together in that respect. But they went apart in pieces." (p. 546.)

He then describes the effect that it had upon the fire, which was to deaden and pack it. (546.)

"I mean to say that if thirty per cent. of fine stuff was caught on the floor through the chutes there was at least thirty per cent. more of fine stuff that went by the chutes that did not fall, and went into the generator. That is, of course, only estimated. I had no way of telling the exact amount. But the amount of fine stuff that went by was material—very material." (pp. 546, 547.)

He then describes the appearance of the fire and shows the impossibility of getting good results unless the fire is loose and the steam and air can be brought in contact with the whole mass. He also testified that the packing of the fire necesitated increasing the blast and that had the effect of carying large quantities of fine stuff over into the carburetter. (p. 548.)

But evidence of a most conclusive character, not only of the ruinous character of the bricks that were furnished as fuel, but also of the antagonistic and unfair attitude of the gas company officials, is furnished in the written protests that Mr. White made on the 18th and 23rd of March, and the replies of Mr. Luckenbach thereto, and his evidence concerning the same. This incident, to our minds, raises almost an irresistible inference that the gas company did not want this machine to make good; that on the contrary they expected to seize upon any pretext

Mr. Pederson, asked as to the quantity of this porous, unsubstantial fuel that went into the generator, said:

> "Different quantities of the same fuel each day, and some days it would be abnormally bad and we would get more of this dust over, but just to what per cent. I would not be able to say. It would be, I should judge, about the same per cent. that the waste carbon would show to the carbon delivered. It would approximate the same."

Mr. White is even more emphatic in his denunciation of the poor condition of the fuel and the disastrous effects of it. He said that kiln-drying of the bricks undoubtedly destroyed their tensile strength and they went to pieces very rapidly and easily. They would not stand handling.

> "The principal and most perceptible observation of their breaking was from the time they left the hole down in the ground and got upon the chute—became dumped over. And they had a severe fall from there down to get into the bottom of the bin that connects into the chute. They came tumbling over each other and rattling down and hitting that gate and bouncing over each other. That is where the severe strain was on the brick. It knocked them all to pieces." * * * "The dust was something fierce. You could not recognize a man while you were charging standing two feet from him. It was just one mass of dust from the fine and dried kiln-dried bricks. The dust they formed was like you take a dusty street with a dozen horses stampeding. It was something fierce." (pp. 545, 546.)

A considerable part of the broken material and fine stuff went through the slits in the chute, but there was a great deal went past the chutes into the generator.

> "I should say that the slits would not be able to catch one-half of the fine dust that went into the

generator, not counting the broken bricks. It was exceptional that a whole brick ever went in. They were generally broken in two. But if they were all like that we would not have complained—if they had held together in that respect. But they went apart in pieces." (p. 546.)

He then describes the effect that it had upon the fire, which was to deaden and pack it. (546.)

"I mean to say that if thirty per cent. of fine stuff was caught on the floor through the chutes there was at least thirty per cent. more of fine stuff that went by the chutes that did not fall, and went into the generator. That is, of course, only estimated. I had no way of telling the exact amount. But the amount of fine stuff that went by was material—very material." (pp. 546, 547.)

He then describes the appearance of the fire and shows the impossibility of getting good results unless the fire is loose and the steam and air can be brought in contact with the whole mass. He also testified that the packing of the fire necessitated increasing the blast and that had the effect of carrying large quantities of fine stuff over into the carburetter. (p. 548.)

But evidence of a most conclusive character, not only of the ruinous character of the bricks that were furnished as fuel, but also of the antagonistic and unfair attitude of the gas company officials, is furnished in the written protests that Mr. White made on the 18th and 23rd of March, and the replies of Mr. Luckenbach thereto, and his evidence concerning the same. This incident, to our minds, raises almost an irresistible inference that the gas company did not want this machine to make good; that on the contrary they expected to seize upon any pretext

to force the defendant to remove it and to recover their money, and throughout these operations they were preparing themselves for this lawsuit.

Mr. White's letter of March 18 is addressed to Mr. Luckenbach and opens with a protest against the character of the fuel. He recites that the bricks crumble and break all to pieces in going down the chute:

> "To confirm the statement you will only have to look at the report for fine carbon returned or credited to us yesterday. Ordinarily after each charge there were only about three wheel-barrow loads of fine stuff on the floor which had dropped into the chutes. Yesterday there were from eight to eleven wheel-barrow loads after each charging. It is evident that the process which you use in drying out these bricks has had a tendency to disintegrate them. Previously, although they were dry, as analysis showed, they held together as well as any of the bricks containing a larger percentage of moisture. But these kiln-dried bricks have not enough tensile strength to keep them from going to pieces and powdering up. We demonstrated by the first two days operation that the machine could make from 2,400,000 to 2,700,000 feet per diem. If the carbon would hold together as well as the carbon used at that time, we could undoubtedly do better than we did on the days we made between 2,400,000 and 2,700,000, but it is unreasonable to suppose that we can operate the machine on fuel containing such a large percentage of fine carbon, which is not only worthless but a detriment. It looks bright enough from the top charging floor, but as soon as the steam strikes it it kills it. We made yesterday only 2,166 000 feet. If the carbon continues to be no better than that used yesterday and this morning, I doubt very much if we can even make 2,000,000 feet today and the following days.
>
> "If you can give us a grade of fuel similar to what we have previously had, we can undoubtedly work

> the fine stuff out and build up the fire again, but if the carbon continues to be as bad as above stated, we cannot expect to obtain efficiency. We have re-checkered the carburetter and are now positive that it is none other than the dirty fuel which gave us the poor results obtained yesterday." (p. 223.)

Now, here was a plain statement of facts, made while the test was progressing. To verify it, it would only have been necessary for Mr. Luckenbach to have gone to the machine and observed the conditions. Instead of that, upon receipt of the letter, he took his lawyer and made a trip to the office at the plant and interviewed Mr. White.

Mr. White testifies that when Mr. Luckenbach arrived, he asked him to go to the machine and observe the conditions, but Mr. Luckenbach refused. "He said he would not come over and dirty his clothes going over there." (p. 554.)

Mr. White says that he produced at that time four or five hot bricks and showed them how they crumbled; that they were all full of fissures, and that the kiln-drying in driving the water out had undoubtedly loosened up the openings or fissures. He also testified that he informed Mr. Luckenbach that the bricks were something awful; that he could not make gas with them; that they were crumbling so that it was impracticable and it was absolutely useless to continue trying to bring about satisfactory results; that the carbon was ruined on account of being kiln-dried; that the bricks would not stand up at all; that there was no tensile strength;

> "but I asked him if it would be agreeable to let us use some of the moister bricks, stating that they

could not be any worse than these, and we might be able to work out; *and he said no.*" (P. 553.)

Now turn to Mr. Luckenbach's testimony.

He said he received this letter on the morning of the 18th and immediately made a call at the plant with his attorney. He met Mr. White at the office. He first denied that Mr. White produced any samples for the purpose of showing their unsubstantial character, but afterwards admitted that it was a fact that samples were produced. He produced a memorandum which he said had been written by him after returning to his office, as a record of what had taken place, and from that memorandum he testified:

> "Mr. Edwards asked Mr. White the distinct question whether the bricks furnished him for use in the generator were in good condition when he received them. He replied that they were and that they were all right. He stated that the bricks at the time they were delivered to him were whole, good bricks, and the breaking up of which he complained occurred after the bricks were put into the chute and during the time they were passing from the entrance of the chute into the generator and while handling them through his own apparatus." (pp. 277, 282.)

After obtaining that admission he and Mr. Edwards left and returned to the office. He was asked:

> "Why didn't you go over and find out what the situation was?" Answered that, "We were down there to see what those bricks were, and Mr. White told Mr. Edwards the bricks were satisfactory, and we went back. I had heavy work, and I went back to take care of it."
>
> "Q. You went down there to see what the con-

dition of the bricks was; why didn't you go over and see?"

"A. I did not care as long as they were satisfactory to the representative of the construction company."

"Q. After he had informed you that they were satisfactory, did you ask him why he had written you the letter previously complaining that they were not satisfactory?"

"A. No, I did not."

"Q. Didn't it occur to you that it was inconsistent with his writing of the letters to say that they were satisfactory?"

"A. I did not care whether it was consistent or inconsistent."

The absurdity of the claim that Mr. White expressed satisfaction with the brick that he was receiving on the very day that he wrote this vehement protest and on the very day that he had exhibited samples to Mr. Luckenbach for the purpose of showing the impossibility of making gas with them, is alone enough to discredit the entire case of the plaintiff, but when these inconsistencies are considered in connection with the letter that Mr. Luckenbach wrote after he returned to the office, the unfairness of his position is made the more glaring and reprehensible. He says:

"We beg to reply that we are furnishing you lamp black fuel containing not more than ten per cent. moisture, and the said fuel we are furnishing you is in every respect strictly in accordance with the terms and conditions of our contract. You have in the past specifically demanded that the fuel furnished to you should comply strictly with the terms of the contract, and in order to comply with your request and to perform our contract in every detail, we have at a great expense and inconvenience

to ourselves taken the precaution to see that every pound of lamp black delivered to you contains not more than ten per cent. of moisture, and every pound of lamp black delivered to you in this test has been absolutely in accordance with the terms of our contract. Your request at this time that the lamp black furnished to you be furnished in the form of bricks which cannot be broken is unreasonable and not in accordance with our contract requirements. We call your attention to the contract which simply requires that the fuel furnished by us be 'dry lamp black containing not more than ten per cent. moisture' and in no place does the contract require us to furnish you lamp black in the shape of bricks or in any congealed form whatsoever. At the times when we have furnished you lamp black in the form of bricks, it was because it happened to be convenient at that time to deliver the fuel in that form, but the contract does not require us to furnish the fuel in the form of bricks or in any given form, and certainly does not require us to furnish the fuel in the form of bricks of such unusual properties as you suggest. Such was never contracted for or contemplated between the parties.

"If your set will not make the quality and quantity of gas with the fuel economies provided for in the contract, such failure is certainly due to an inherent defect in the set itself and not in the quality of the fuel furnished you." (pp. 225, 226, 227.)

Why did he not remind Mr. White of his expression of satisfaction with the bricks? Why did he not inclose a copy of his memorandum of the interview? The obvious reason is that no such remark was made; and he knew that such a suggestion would only call forth an emphatic denial.

Moreover, we insist that this letter contains almost, if not quite, a complete confession of the ruinous consequences of fire-drying the brick. If the process did no

damage to the brick, or increased its efficiency, would it not have been the most natural thing in the world in this reply to have made some defense of the process? Instead of attempting to justify the artificial drying process that was so objectionable to Mr. White, he falls back on the strict letter of the contract and rests content with the denial that they were under any obligations to furnish the material in any particular form, shape or quality, so long as it contained ten per cent. moisture. Such a position, as we have already shown, his own counsel at the trial of this case, while asserting the same in a half-hearted manner, nevertheless practically concedes is not maintainable. Mr. Luckenbach had not at that time realized that this material which they were required to furnish for fuel in order to be lamp-black according to the strict letter of the contract, must be chemically pure carbon. He had overlooked the fact that the material called lamp-black at a gas plant contains anywhere from twelve to twenty per cent. of tar or other hydro-carbon impurities. It was not until these considerations presented themselves to their minds at a later stage of the controversy that it became evident that they could not stand upon the strict wording of the contract without committing their poisoned chalice to their own lips.

It will also be asserted, no doubt, in defense of such conduct, that the gas company was not in a position to supply bricks of any other quality, nor to reduce the bricks on hand to a moisture content of less than ten per cent. without kiln-drying. But consider such a defense in the light of Mr. White's protest of March 18, Luckenbach's reply, and Mr. White's testimony as to the in-

terview. All that Mr. White asks for in the letter of March 18 is brick of the same character and quality that had been supplied in the early days of the test. Or a fair construction of his letter is that he would have been satisfied if they would stop kiln-drying them, and certainly, taking this letter in connection with his own testimony, it is established that he would have been content with that.

White asked him if it would be agreeable to let him use some of the moister bricks, stating that they could not be any worse than these, "and we might be able to work out, and he said no." (p. 553.)

And again, at the same interview, Mr. White testifies:

> "He (Luckenbach) came right down to the works with Mr. Edwards and wanted to know what the matter was. I told him the bricks were hot and that it was useless to go on under such conditions, and I asked him if he would—if it would be agreeable to him if I would take the wet brick that he had to use half and half—half wet and half dry—to see if we could not build up the fire and get some results. *And he said no. We had to use what they gave us. We had asked for carbon having less than ten per cent. moisture and they kiln-dried it, and that is what we had to use. I showed some of it to the superintendent in his office. He said that did not make any difference, that it was up to us.*"
>
> "Q. On that occasion, or any other occasion, did you tell Mr. Luckenbach that the bricks as you had received them had been satisfactory?"
>
> "A. I did not." (pp. 552, 553.)

Fancy such a refusal under such circumstances of such a request by the representative of the gas company! It could not have proceeded from any other motive than malice. It cannot be explained upon any other hy-

pothesis than that the gas company did not intend to have this apparatus, or to pay for it, or to permit the test to show the real capacity of it, or at least, if Mr. Luckenbach could help it.

It would have been so simple to have complied with the request. It would have saved the gas company all the expense of fire-drying; it would have been some evidence of their good faith toward the construction company, and it might, and probably would have, resulted in the fires in this apparatus being restored to normal conditions and a capacity probably largely in excess of two million cubic feet per day demonstrated.

But even aside from this request to furnish bricks other than kiln-dried, even though they contained a greater percentage of moisture than ten per cent., there is no justification for the claim that the gas company was not in a position to furnish bricks of less than ten per cent. moisture without kiln-drying. Mr. Creighton shows in his testimony that a large quantity of the outside layers of the bricks that were kiln-dried contained less than ten per cent. (pp. 686, 688, 689.) (Mahard, pp. 319, 321.)

But aside from this, their letter of March 5, 1911, shows that they were then purchasing, and the evidence shows that they did install a drier by means of which the brick could have been dried to a moisture content of less than ten per cent. and bricked. It is true that Mr. Creighton claims that the drier would not reduce the material to that degree of moisture, and he also made a strenuous effort to show that it was not practicable to

brick such dry material, but the testimony of Mr. Pederson (p. 428) is to the contrary, and it would seem to be a self-evident proposition that it is practicable to brick the material with no moisture at all. It is an admitted fact that the tarry hydro-carbon substances which form about fifteen per cent. of these bricks is in the nature of a binder and acts as such in the process of bricking. It is absurd to say that water could act as a binder, especially in view of the testimony of our expert chemist, who said that it was impossible that the water could act as a binder, or that there was any reaction that could take place between the moisture and the carbon which would have the effect of making the material more readily bricked. (Chandler's testimony, p. 756.)

But even it if were true that bricking this material after being dried to ten per cent. was impracticable, it is in evidence that besides the bricking machines that were installed at this plant, the company was then operating briquetting machines and making good, substantial briquettes which could have been supplied to this apparatus, and which would have no doubt held their shape and enabled the construction company to have more than fulfilled the guaranties. We have already called attention to the evidence which showed that at the time the contract was made, the gas company was manufacturing good, hard, substantial briquettes, and in Mr. Young's testimony we have a complete account of the success of their briquetting operations, taken from a magazine article which he had written on the subject. (pp. 742, 745.) It is there shown that at the time of

the test they had briquetting machines of about thirty tons capacity per day (p. 745) and they had bricking machines of a capacity of about sixty tons (p. 241.)

Nothing could be more evident, then, than that the gas company was in a position to have supplied a good, substantial brick or briquette of less than ten per cent. moisture, and certain it is that they could easily have complied with Mr. White's request to furnish stronger bricks, even though they did not contain less than ten per cent. moisture.

Again, on the 23rd day of March, 1910, Mr. White addressed another protest to Mr. Luckenbach. He says that "the bricks are the worst for breaking up that we have ever had. I notice this morning they are still hot from the fires you build to dry them out. I call your attention to the fact that last night after two charges, the man wheeled away from under the chutes seven and eight wheel-barrow loads, respectively; this morning twenty-three." He gives further particulars and states that a great deal of the fine stuff handled went into the fire, and the result of last night's make shows clearly the result of a dirty fire. He says further, "You can readily understand that it would not be considered possible for a machine to make gas advantageously where fuel of this character is being introduced. Might as well expect a water gas set using coal to make gas and keep up the standard if breeze is substituted instead of coal.

"I have your letter of the 18th and note your remarks regarding the character of the carbon to be furnished, etc. Will not go into this matter as I have not the data to discuss the question. However, I have been under the impression that your company was to co-operate with us

in every way to bring about the successful operation of this machine; but it would seem impossible if we were to meet the guaranty using the character of fuel furnished." (pp. 227, 228.)

Mr. Luckenbach's reply to this letter is as follows:

"Replying to yours of the 23rd instant, beg leave to say that an answer to this communication is contained in our letter of the 18th instant, receipt of which you have acknowledged." (*Id.* p. 229.)

So we see the extent of the co-operation and all of the consolation that Mr. White got for his efforts. The company were standing strictly upon their then interpretation of the contract, according to its strict letter, that in whatever bad form the material may have been furnished, still, they were complying with their contract if it contained less than ten per cent. moisture.

Still further most significant evidence of the bad character of the fuel and the crumbling that took place, is furnished by the records of the waste resulting as compared with the carbon used.

The following is a tabulation of the gas produced, carbon used, and the waste and ash which was removed from the machine:

Date.	3/10	3/11	3/12	3/13
Corrected Gas	2,700,000	2,422,000	2,247,000	1,936,000
Total Carbon	134.275	97.775	90.700	69.350
Waste Carbon	11.100	16.200	14.050	20.325
Ash	12.000 (Estimated)	9.000 (Estimated)	4.850	6.000

Date.	3/14	3/15	3/16	3/17
Corrected Gas	72.300		107.000	2,039,000
Total Carbon			8.000	103.200
Waste Carbon	(Shut down 3 days recheckering)			32.800
Ash	73.50			2.200

Date.	3/18	3/19	3/20	3/21
Corrected Gas	2,095,000	2,028,000	2,130,000	2,171,000
Total Carbon	84.000	86.510	85.575	90.700
Waste Carbon	28.675	16.250	10.850	7.550
Ash	9.750	10.500	5.450	7.550

Date.	3/22	3/23	3/24	3/25
Corrected Gas	2,074,000	2,008,000	2,015,000	1,956,000
Total Carbon	90.565	74.525	81.520	72.925
Waste Carbon	13.960	23.700	9.720	13.700
Ash	9.000	10.100	8.465	8.000
Date.	3/26	3/27	3/28	3/29
Corrected Gas	1,950,000	1,824,000	1,640,000	1,292,000
Total Carbon	57.600	53.215	58.700	34.750
Waste Carbon	18.900	12.375	7.900	12.100
Ash	4.600	2.150	4.300	5.300

The waste carbon is the carbon that fell through the chutes while charging, and the ash is the unconsumed carbon that was removed from the dust chamber which collected a portion of the dust which blew from the generator to the carburetter, and unconsumed carbon taken from under the grate bars. The ash for the first two days, March 10 and 11, is an estimate, as no record was kept of the weight of that material for those two days. This tabulation is made from the tabulation contained in the evidence, as follows:

Gas production, page 347.

Schedule of waste carbon described as ash, page 542.

Schedule of carbon consumed and waste carbon, page 542.

From the foregoing it will appear that the percentage of waste carbon which fell through the chutes to the total carbon consumed, and also the percentage of ash to the whole carbon delivered, and the totals, are as follows:

Proportion waste carbon falling through chutes each day, to the total carbon delivered for that day.

3-10	3-11	3-12	3-13	3-14	3-15
8%	16.5%	15.4%	29%	0	0
3-16	3-17	3-18	3-19	3-20	3-21
0	31.7%	34%	18.7%	12.6%	8.3%
3-22	3-23	3-24	3-25	3-26	3-27
15.4%	31.8%	11.9%	18.7%	32.8%	23.2%
3-28	3-29				
13.4%	34.8%				

Percentage of ash removed each day, of the whole carbon delivered.

3-10	3-11	3-12	3-13	3-14	3-15
8.9%	9.2%	5.3%	8.6%		0
3-16	3-17	3-18	3-19	3-20	3-21
0	2.1%	11.6%	12.1%	6.3%	8.3%
3-22	3-23	3-24	3-25	3-26	3-27
9.9%	13.5%	10.3%	10.9%	7.9%	4.4%
3-28	3-29				
7.3%	15.2%				

Percentage of waste carbon from the chutes, for the full time of the test, of the total carbon delivered during the entire test.

Total carbon delivered	1,373,885
Total waste carbon from the chutes	270,155
Percentage	19.6%

Percentage of total ash removed for the whole period, of all carbon delivered.

Total carbon delivered	1,373,885
Total ash removed	126,565
Percentage	9.2%

Percentage of both ash and carbon for the full period, to the total carbon.

Total carbon delivered	1,373,885
Total ash and waste carbon	396,720
Percentage	30.3%

Total gas made 34,706,300

Now, taking these figures in connection with the testimony of both Mr. White and Mr. Pederson that fully as much fine material and pulverized brick went into the generator as fell through the chutes, a very significant idea of the extent to which the fire was smothered by the influx of this loose material may be formed.

On the whole, we respectfully submit that the evidence absolutely concludes the proposition that the generator in this water gas set was not given anything like a fair opportunity to show its capacity; that the crumbling of the fuel took place to such an extent as to be ruinous, and to render good results impossible; that the fire-drying to which the bricks were subjected was the primary cause of the unsubstantial character of the bricks, and under no circumstances or appearance of fairness and justice to the defendant, had the gas company a right to persist in that process. It stands to reason that if a brick contains, say, twenty-five per cent, moisture, that at least one-quarter of the volume of the brick is occupied by the water, and perhaps more, because the carbon is heavier and denser than the water. Therefore, it is a self-evident proposition that if you drive the moisture out of the brick, you are leaving one-quarter of the space in the brick void. Besides that, it is not impossible that the intense heat to which these bricks were subjected may have had the effect of driving out the volatile hydrocarbons which form the binder, and it follows necessarily, therefore, that the process of drying the brick would destroy its durability and render it easily disintegrated or pulverized. At any rate, this was a question of fact for the lower court, and it had a right

to take the opinions of Messrs. White, Pederson and Chandler that that was the effect, and the finding upon this issue should control in this court.

III.

There never was a test of this machine as provided in the contract. The Construction Company during this test was entitled to suitable, if not ideal, conditions under which to operate the apparatus, and it was the duty of the Gas Company not only to comply strictly with all obligations undertaken by them with respect to the test, but it was also its duty to co-operate in a spirit of fairness and good faith to give the apparatus a fair test.

It must be borne in mind that this was not a gambling contract whereby the construction company was staking its right to recover the purchase price of the apparatus upon chance; it was not speculating upon the chance that good luck would make it possible for the apparatus to generate gas for a period of twenty days without a break-down or a misfortune. Certainly no one would contend that if through some accident, unavoidable in its character, during the twenty days test, the apparatus had been rendered incapacitated, that the defendant company would lose its large investment in the plant through such ill fortune. And throughout the contract of July 12 it is made apparent that the right of the construction company to receive payment for the plant was not made to depend upon what it actually *produced* during the twenty days, but on the contrary, the parties have scrupulously and repeatedly used the word "capacity" instead of "production." It is stipulated that if the party of the

first part shall in said test bring its apparatus to the *capacity* of 2,700,000 cubic feet, etc., it shall be entitled to payment. It is true that the capacity is to be determined by the twenty days test, and it is the average capacity per twenty-four hours demonstrated during the test that is to control the rights of the parties. We contend that the capacity proven is a very different thing from the production attained during the twenty days. To be sure, if the apparatus was in constant operation during the entire twenty days under normal conditions, the very best criterion, and indeed the conclusive proof of what its capacity is would be the actual production, but on the other hand, it surely is manifest that if the apparatus had produced an average of two and a half millions of cubic feet of gas operating under normal conditions for sixteen of the twenty days, and was idle the other four because of some unforeseen and unavoidable mishap, it would be absurd to say that the capacity of the apparatus was the aggregate production divided by twenty.

It was necessary, therefore, for the plaintiff to prove, not that the test was started on the 10th of March and ended on the 30th of March, but it was necessary for the plaintiff to prove that there were 20 consecutive operating days of 24 hours each from the time of the commencement to the time of ending the alleged test, and this the plaintiff has not done. The plaintiff only claims that 20 calendar days passed.

Let us present a little more fully this question of whether the contract means calendar or operating days. If it meant calendar days, the contract was nothing more

nor less than a wager; that is to say, if the contract meant calendar days, the defendant bet more than $26,800 practically against nothing that the machine would operate 20 consecutive days without breaking down, and perform all other conditions of the contract. If calendar days is meant in the contract, then if the machine had started up and run an hour, or a day, and had broken down and been unable to run the next 19 days by reason of the break, the bet would have been won by the plaintiff. This is precisely what the plaintiff claims.

Absolute certainty or perfection are not attained in this world. Courts take judicial notice that machinery will break down in spite of all the ingenious skill of man. Man is the most nearly perfect thing on earth, and yet man is not perfect. If the defendant in this case, being a non-resident, had employed a superintendent, as provided in the contract, to superintend the test of the machine, and that superintendent had become ill, under the construction placed upon the contract by the plaintiff the defendant would have lost its bet.

When these people entered into this contract they necessarily took into consideration what the court judicially knows, to-wit: that machinery is not perfect, and what the court judicially knows are stipulations written into the face of every contract.

Let us refer here to some of the facts proven in this case to demonstrate the contention of the defendant in this particular is correct. It was proven in the case that it was not the custom to operate such machines as herein involved for a longer period than six days without a day's rest; especially is this so in the city of Los Angeles

at the works of the plaintiff. It was shown that a month or two prior to the commencement of this test, what was known as a blast pipe—machinery belonging to and under charge of plaintiff—was destroyed, just about the time the parties were ready to make a test. That defect in the plaintiff's machine was repaired, and then an accident occurred to the machine of the defendant that caused another delay before the test was commenced. Can it be that anyone would contend in a court of justice that if the test had been commenced and the plaintiff's machine had broken down as it did before the test—the part of the plaintiff's machine that was necessary to operate the machine in controversy— that such a test would have been binding upon the parties? In this particular instance the machine did actually break down after it had been in operation four days, and the defendant claims that while the machine was thus disabled, it was not in operation, and the test of the capacity of the machine was not being made. During the three days that the machine was shut down there was not, and there could not be, any measurement of the capacity.

The court will observe that this contract says that there shall be a test of not less than twenty consecutive days of 24 hours each. If the contract between the parties meant calendar days there was no necessity of using the words "twenty-four hours," because calendar days necessarily means that. That is a sidereal day. But since the parties meant operating days, it was necessary to specify the hours governing each period.

Twenty consecutive days must mean twenty consecutive operating days. Any other construction would

make the contract impossible of performance and absurd. If this were a gambling contract, such a construction might have been contemplated, but it was simply the means provided for ascertaining a definite fact, namely, the capacity of the machine, and the contract should be construed accordingly. The authorities sustain the construction contended for by defendant.

Huber Manufacturing Co. v. H. Crawford & Son, 175 Federal, 219;

City of El Paso v. National Bank (Texas) 71 S. W. 799;

Citizens' Electric Light Company v. Gonzales Water Power Company (Texas), 76 S. W. 577;

Francis Bros. v. Heine Safety Co., 112 Federal 899;

Appeal of Hofer, 9th Atlantic 441;

Alta Land &c. Co. v. Hancock, 85 Cal. 219;

Town of Pendleton v. Saunders, 24 Pacific 506;

Fuller v. Shroeder, 31 N. W. 109.

We desire to call the court's attention to the case of the City of El Paso v. National Bank, *supra*. That case involved a sale under a trust deed, which authorized a sale on the publication of the advertisement of sale for ten consecutive days in some daily newspaper published in a certain city. The advertisement was published for more than ten days continuously in the Daily Herald, but two Sundays intervened on which this notice was not published, although there was a publication known as the Sunday Herald made up of a print of matter which appeared during the week published on that day. It was

held that the publication was sufficient, and this ruling was applied, notwithstanding the requirement of strict compliance with the provisions with reference to notice in a trust deed of that character. The court said:

> "While the term, 'consecutive days,' primarily means that many days directly following one another, it is also defined as meaning 'successive.' But in cases of contracts, that significance should be given it that the parties evidently intended it should have. By the expression, 'for ten consecutive days in some daily newspaper published in El Paso,' the parties must have intended publication in a daily newspaper in consecutive numbers as such paper was published. If published every day in the week, then it might be contended that the notice should appear in every issue. If, however, the paper was issued on every day except Sundays, it was nevertheless a daily newspaper, as such papers are commonly understood. The courts have held publications in such a paper to be continuous from day to day, although without Sunday issues." (Citing Washington v. Bassett, (R. I.) 2 Am. St. 929; Kellogg v. Carrico, 47 Mo. 157);

and the court continues:

> "We do not regard the word 'consecutive' in this connection as any more forcible than the word 'continuous.' Both signify unbroken."

We also desire to refer to the case of Town of Pendleton v. Saunders, *supra.*

That is a case of analogy and importance. The defendant had constructed a water system for the plaintiff, and in connection with it a 500,000 gallon water reservoir, with a provision that it should not lose from evaporation and filtration more than 1½ inches of water, and that a test of 90 days should be made, and which provided that the town should pump water from

a certain source with its pumps once a week for a period of ninety days to their full capacity. This, the court said,

> "did not impose the duty on the town of doing more than to run its pumps to their full capacity during the time they were usually and reasonably run. It was not required to go to extraordinary or unusual expense for that purpose, or to increase its force of engineers if the one already employed was capable of running the pumps to their full capacity during the hours he was accustomed to run the same. If the supply of water failed for any cause without the city's fault, so that the reservoir could not be filled at the time required, such failure did not put the city in default. But if the cistern from which the water supply was to be drawn was inadequate, or if on account of the season there was a scarcity of water, the city would not be responsible therefor. The city had as much interest in these tests as the contractor. They were designed for the equal benefit of both parties. The undoubted object was to enable them to know by actual experiment whether the reservoir was completed, by being water-tight."

The case of Citizens' Electric Light Co. v. Gonzales Water Power Company is particularly in point. That was a contract whereby the power company agreed to furnish for ten days water power by means of a certain water course and water wheel which was guaranteed to be of 100-horse-power capacity, and the water was to be furnished at its full capacity for the full space of twenty-four hours of each and every day during the full period of the term, or so much thereof as may be required by the second party.

Certain parol testimony was introduced of negotiations that took place before the contract was entered into, as to what had been the previous custom in case of high

water or accident when the water wheels did not run, and it was shown that the custom was to deduct that time. It was claimed, however, that there being no stipulation in the contract that plaintiff should be excused from supplying the stipulated power when prevented by floods, plaintiff was liable for such cessation. The court said:

> "In the first place, we think appellant is mistaken in the subject matter in this contract. What plaintiff agreed to do was to give appellant the use of the water wheel for power purposes. This appears from the face of the contract. The evidence, as we have already stated it, shows that the wheel contracted for was located and adjusted so that at times of high water there was no such thing as its use. This was well understood by both parties, and in our opinion, by contracting for its use as the wheel stood, the parties had in contemplation its use only as it was possible for it to be used. If we place ourselves in the position of the parties at the time, and take the contract as it reads, and the testimony as we have stated it, we believe the conclusion cannot be avoided that the parties did not contemplate nor intend that the contract should relate to periods when in the nature of the thing contracted for it was incapable of use."

How, then, can it be said that this machine had a twenty days' test within the meaning of the contract? It not only never was permitted to be operated twenty consecutive days, but during the days it was operated, such adverse conditions prevailed as to render nugatory the purpose of the test. The conclusion of the court, therefore, that there never was such a test as the contract called for is fully sustained.

In MacKenzie Furnace Co. v. Mallers (Ill.) 83 N. E.

451, plaintiff had agreed to furnish an automatic stoker to be used in connection with a boiler which was built upon the premises of the buyer. Defendant was to construct the boiler and it was to have a capacity of 240-horse-power, and in that event the stoker was to develop 30% increase of horse power, and full payment was to be made after the test and acceptance. A test was made, and for the first four hours the guaranty was more than fulfilled, but during the last two hours it fell below, and the average for the six hours was less than the guaranty. The combustion of fuel, however, was imperfect, and it was claimed that the boilers were not in good condition, and an offer was made to permit another test under improved conditions. This offer was refused and a demand made that the stokers be removed. It was claimed that the guaranty having been made with reference to the existing conditions, that the parties must have had in view those conditions, and whether favorable or unfavorable, the failure to make good the guaranty, defeated the right to recover the purchase price, but the court said:

> "We cannot give to the contract a construction so unreasonable and contrary to the common understanding as the one contended for. It is true that the rated capacity of a boiler is an estimate only, and that a boiler rated at 240-horse-power may not develop exactly that power; but when the parties referred to a boiler of 240-horse-power, they certainly contemplated a boiler which was expected to develop that much power. The plaintiff was entitled to have the boiler in such condition that when fired without the stoker it would produce the horse-power which a boiler so rated ordinarily produced. To construe the contract as requiring the plaintiff

to develop 320-horse-power with the boiler in such condition that it did not act normal and would not produce anything like the horse-power at which it was rated, would be most harsh and unreasonable. * * * The evidence satisfactorily established that the fault was not in the stoker, and that it would have developed the horse-power required, if the boiler had been in proper condition."

Id. 452.

See also:

Fuller v. Shroeder, (Neb.) 31 N. W. 109;

Tasker v. Crane Co., (Ill.) 55 Fed. 449;

Howard v. American Mfg. Co., 36 N. Y. Sup. 430;

Mack v. Sloteman, 21 Fed. 109;

Miller v. Patch Mfg. Co., 91 N. Y. Sup. 870;

Gaar Scott & Co. v. Hicks, (Tenn.) 42 S. W. 455, 457;

El Paso, etc. Co. v. Eichel (Tex.), 130 S. W. 922, and see especially pages 943 and 944.

We have already pointed out the unfairness and injustice of the conduct of the gas company with respect to the reasonable protests and requests of our operators on account of the fuel, but this was not the only instance where this same spirit of antagonism and unfairness and bad faith was manifested. In the first place, all of the gas experts who testified in the case agreed that before a new machine is put into operation there invariably exists a necessity for experimenting with the apparatus in order to determine in just what manner the steam and air should be applied, the duration of the make, and the blast, and numerous other details in the matter of ad-

justment which vary with the conditions and can only be regulated by the observation of the operator after experiments. This is called "balancing" the machine. It must be remembered that when this new generator was completed, in the latter part of December of 1909, it had never been operated. It was an unusually large generator, if not indeed the largest that had been constructed for the generation of water gas. It was to be divided into two compartments and was in effect two generators with grate areas of not unusual dimensions, but nevertheless it was highly important for the operator to determine just in what manner and in what quantities and under what pressure the air blast should be applied, in order to get the best results. The matter of fuel, as we have before shown, was also a question of grave importance. Naturally our operators were anxious to accommodate the gas company and make the best of the fuel that they had on hand. Most of it contained moisture in excess of ten per cent., and Mr. Millard, as we have shown, on behalf of the gas company, was advocating the advisability of using the brick with excessive moisture in preference to the dry brick. Both Mr. White and Mr. Pederson were inclined to accede to the request, but Mr. Pederson wanted to get credit for the weight of the excess moisture in determining the fuel consumption, which would seem to be a most reasonable request. He explained to Mr. Luckenbach that not only did it lose the weight of the water, but it also required more heat, and therefore consumed more fuel in driving out the excess moisture, and that we should therefore get credit for the weight of the extra moisture,

but Mr. Luckenbach refused to consider that. (pp. 457, 458.)

That was the occasion of Mr. Pederson writing the letter on December 28, revoking their former letter expressing their willingness to use bricks of a greater moisture content. So it was only fair that these operators should have been given an opportunity to experiment with the different grades of brick and ascertain how it acted in the machine before starting the test. One of the important requisites was to determine the proper depth at which to carry the fuel bed, and of course this could only be determined by preliminary experiments. It was also highly important to determine the quantity of oil to be fed into the carburetter during the make period, so as to regulate the proper candle power and the proportion of oil gas to the water gas. Both Mr. Pederson and Mr. White testified that not only in the matter of the reconstruction of the apparatus, but also in the matter of making the necessary adjustments, preliminary experimental runs and in the balancing of the machine, they used the utmost expedition at all times; that they were in progress of completing their adjustment when the explosion that we have already referred to took place in the middle of January, through no fault of theirs, as both Mr. Pederson and Mr. White testified. (Pederson's testimony, pp. 420, 424; White's testimony, pp. 533, 534.)

Shortly afterwards another accident occurred, also due to some unfortunate circumstance beyond the control of anyone, and thus preparations for the final test were seriously delayed. However, along about the mid-

dle of February, Mr. White was in a position to make another experimental run for a few days, and then it was that he decided to double the volume of his air supply and to perforate his chutes, to re-checker his carburetter, and make certain other adjustments that would put the machine in condition for the final test. However, Mr. Luckenbach became impatient, and on February 25, 1910, he wrote Mr. White and informed him that since the explosion and the delay occasioned thereby, he was not satisfied with the way the work had been pushed preparatory to the final test. "We therefore insist that you continue the final test of the apparatus on March 1, 1910, and prosecute the same with reasonable diligence and strictly in accordance with the contract." (P. 212.)

Mr. White testified that it was utterly impossible for him to be ready by the first of March, and he consequently went to Mr. Luckenbach and solicited further time. Mr. Luckenbach agreed to give him ten days additional, only he insisted that he start the test on the 10th of March without fail. Mr. White was bound to agree to these terms, for of course he was at the mercy of the gas company, which had it in its power to cease supplying fuel or operating, and oust him from the premises. Accordingly he did accede to the request. Thereupon Mr. Luckenbach wrote a letter to Mr. White, in which he granted the request for an extension of time to the 10th of March (p. 213) and at the same time he dictated a letter for Mr. White to sign in which it is made to appear that Mr. White requested the postponement and agreed to start on that day, (p. 210). Mr.

Luckenbach in his cross-examination admitted that he dictated both letters. (Pp. 265, 266.)

Mr. Luckenbach also admits that when the 9th of March came Mr. White informed him that he was not ready; that the carburetter was not clean and he wanted time to re-checker; that Mr. Pederson, the operator who was intended to relieve him twelve hours of the twenty-four of each day, had been delayed by washouts and could not arrive for two or three days. But nevertheless Mr. Luckenbach refused to grant the extension. Mr. Luckenbach testified that Mr. White asked for consent to begin on the morning of the 11th instead of the morning of the 10th, but he refused to accede to it. (Pp. 267-269.)

There was nothing for Mr. White to do therefore except to start alone on March 10. He testified that he did not think he would have time to get up his heats by six o'clock on the next morning, but nevertheless when he arrived on the ground at that hour he admits that so far as the fire was concerned, the machine was ready to proceed; but that the carburetter was in no condition to stand the test on the morning of the 10th, was painfully but conclusively demonstrated before the machine had been in operation three days. On the fourth day the make had dropped off about 800,000 cubic feet, and when the apparatus was shut down and the carburetter opened up the next morning, according to Mr. White, it was found to be so badly clogged that it was only a marvel that any gas could get through. (P. 535.) That this condition could not have resulted, if they had been given time to clean the carburetter, even with the im-

proper fuel that was supplied them, is the opinion of both Mr. White and Mr. Pederson (p. 535) (Pederson, p. 497, p. 432, p. 507). Besides that, consider the unreasonableness of compelling this test to start without Mr. Pederson being on the ground. The operation was to continue, of course, night and day, and Mr. Luckenbach knew that the construction company had only one representative on the ground. This meant that during the night of March 10 and the night of March 11 the apparatus was operated by gas company employees without any representative of our company present. Mr. Pederson arrived on the 12th, and on the next day the apparatus was closed down with a clogged carburetter, which of course would never have happened if the gas company officials had been liberal and fair minded enough to have allowed a few days delay in starting the test, so that the carburetter could have been cleaned.

Again, it is the custom in the operation of all water gas sets, to burn out the carburetter periodically. In the operation of the water gas sets at the Los Angeles plant there was an invariable custom of shutting down the sets for one whole day in every seven, and during that time there is either a forced or natural draft allowed to blow through the carburetter for the purpose of burning out the deposits of asphaltum from the oil and carbon from the generator. In this manner the machines are kept clean. (Pederson, p. 417; Luckenbach, p. 271; Creighton, p. 392; White, p. 536.)

In other plants it is the custom to operate the apparatus only twenty hours and allow the other four hours each day for burning out the carburetter. (Guldlin, p.

606.) But in this contract nothing is said about cleaning out the apparatus, and when Mr. White arrived he naturally assumed that twenty consecutive days of operation meant operation according to what everybody understood to be the practical and indeed only way of efficiently operating such a machine; that is, to lay off the apparatus at proper intervals for cleaning. Accordingly, he took up the matter with Mr. Luckenbach on several different occasions in order to have it understood that the twenty consecutive days meant twenty consecutive operating days, and that they were to be allowed credit for such days as the machine was not in operation for cleaning out purposes. But he never could get any satisfaction from Mr. Luckenbach. Mr. Luckenbach himself admits that he refused to commit himself one way or the other. He testified from a memorandum he had made of the interview as follows:

"He (White) then stated to me that no arrangement had been made for cleaning out time and asked me to consent to an allowance of one day in every seven for time within which to clean out the set. I told him we would not consent to any variation from the form of the contract, and would make no concessions of any time until the test was completed. I stated to him after the twenty days test was completed, he would be at liberty to present such requests for concessions as to time lost as he saw fit, and we would then consider them and act upon them; that until the test was fully completed, we would stand strictly on the wording of our contract as it then existed." (And see his testimony, pages 269, 270.)

Again, when the machine was shut down on the 14th, Mr. Luckenbach admits that Mr. White asked him again if they would not be allowed cleaning time if they shut

down and re-checkered. Mr. Luckenbach had also made a record memorandum of the interview and this is his version of it:

"At nine o'clock on the morning of March 14th, 1910, Mr. White called me up on the 'phone, and stated that when he had asked for a postponement of the time to commence the official test from the morning of the 10th to the morning of the 11th he had intended to clean out the carburetter and replace the checker-work in the carburetter, but that he hadn't done so, and the result was that the set was very dirty and in very bad condition, and that he desired to shut down the set for two or three days in order to do this work. I told him that was a matter for him to decide; that he had started upon his official test; and it was up to him to comply with the requirements of his contract. That if he saw fit not to make any gas on a given day that was his fault and not ours, but that the time lost would certainly be counted in in making up the average of gas made by the set. He stated he understood that but that he thought he would gain by it, and therefore intended to shut down the set. He also stated that he understood we were willing to allow him one day in seven for cleaning out. I immediately contradicted the statement and told him no such agreement had been made, but that I had stated to him in the presence of Mr. C. P. Houghton that his test must be made, and then if he desired to present any reasons why he should be given any credits account of lost time, we would receive and consider them, but that we would not be bound by anything except the strict wording of the contract. I made this memorandum immediately upon hanging up the 'phone. At the time this memorandum was made and at the time the conversation took place, Mr. W. J. Dorr, superintendent of gas distribution, was sitting beside me at my table, and certifies to it.

Q. Mr. White rang you up and asked permission to shut down? A. Yes, sir.

Q. And still told you that he understood he had a perfect right to shut it down, and was not entitled to credit for the time he was not operating?

A. Mr. White was endeavoring to trick me—Mr. White called up and wanted permission to shut down the set. Stating that on the 10th he had intended to clean out the carburetter, and replace the checker-work in the carburetter. He said he understood that, but that he expected to gain by it.

Q. Did he explain why he rang you up if he understood he had a right to shut down and was entitled to no credit? A. He did not.

Q. You don't know why he rang you up? A. I have my belief.

Q. What is your belief? A. I believe he wanted to try and get me to consent to a shut-down."

(Pp. 272, 273.)

The value of Mr. Luckenbach's record memoranda is here again demonstrated. For how absurd it would be for Mr. White to ring up for no other purpose than to get the consent of Mr. Luckenbach to shut down when he already understood that he had the right to shut down without anybody's consent, and did not expect to get credit for it. Of course the truth is as Mr. White testified, that he was trying to get Mr. Luckenbach to allow credit for at least one day in seven, according to the custom for cleaning a machine. And he never could get any satisfaction from Mr. Luckenbach on the subject at all. (White, p. 537; Pederson, p. 492.)

Under these circumstances there was nothing for the construction company's operators to do except to endeavor to operate the apparatus continuously during all of the remaining days, notwithstanding it was contrary to good practice in the operation of all such plants. If

these operators had decided to shut down another day between the time gas making was resumed on the 17th and the 30th, it would have meant a fourth idle day, and since they had every reason to believe that the gas company would make no allowance for any idle days, they could only attempt to do the best they could under these most unfavorable circumstances.

But what a travesty it is to say, then, that the production during this test for the entire twenty days determined the average capacity of the machine! It will be noticed that even with a handicap on account of the fuel conditions, more than 2,000,000 cubic feet per day was made for the next eight days, and in view of the recognized practice, even under normal conditions, to shut down every seventh day, it is not strange that about the 25th of March the make began to drop, and that at the end of the test the machine was practically defunct. Does it not stand to reason that if Mr. Luckenbach had been sufficiently fair minded to have allowed a few days for cleaning the carburetor, so that the test might have started with clean apparatus, and had not insisted that they would allow no credit for any idle days during the twenty, or had desisted from the kiln-drying process and supplied the company with the bricks that they easily could have furnished, or with briquettes of a good substantial make, that this apparatus could easily have made largely in excess of 2,000,000 cubic feet of gas per day for twenty consecutive operating days and been well within the fuel allowance.

Again, when the test was completed, and Mr. White learned that Mr. Luckenbach was not satisfied with the

results, he offered to proceed immediately to put the apparatus in condition and make another demonstration, and begged for an opportunity to satisfy him that the machine would make good, but all solicitations of this character were promptly and emphatically repulsed. He had announced to Mr. White that the test was to start on the 20th and end on the 30th, and he refused to make the slightest concession one way or the other, or to deviate from the strict letter of the contract in any particular, notwithstanding one of the provisions of the contract was that

> "In making the above agreement, the gas company will be expected to aid our operator in fulfilling the guaranty, insofar as he may require modification of blast, dry steam, etc., this part of the machinery not being installed by us and consequently not under the direct supervision of our operator." (P. 10.)

The "etc." may well be construed to mean co-operation in all reasonable requirements under the control of the gas company. Yet throughout, Mr. Luckenbach exacted his pound of flesh, and even refused to allow Mr. White to know what his understanding was as to a doubtful feature of the contract. A glance at the correspondence which passed between Mr. Luckenbach and Mr. White shows the unfairness of refusing to allow a second test. (Pp. 215, 217, 221, 223, 281, 284, 292 and 293 of Luckenbach's testimony.) (Pp. 558 and 561 of White's testimony.)

We again respectfully submit that there never was a fair test of this apparatus such as was contemplated by the parties or provided for in the contract.

IV.

Notwithstanding the abnormal conditions presented, substantial compliance with the guaranties was demonstrated.

We have already called attention to the fact that the amount produced during the twenty days test was not necessarily to be the criterion of capacity. The contract provided merely that an average capacity per twenty-four hours of 2,000,000 cubic feet or more was to be shown, and we think we have proven beyond doubt that the showing made under the existing conditions was a most remarkable one indeed and furnished conclusive proof that under normal conditions the apparatus did have a capacity largely in excess of the minimum and well within the fuel economies prescribed.

But even aside from that consideration, we think it not out of place to call attention to the near approach to performance of the guaranty, even on a basis of the actual results of the test. The total amount of corrected gas made is 34,706,300 cubic feet for the seventeen days on which the machine was in operation. We think we have shown that the fair interpretation of the contract is that twenty consecutive days must mean twenty consecutive operating days, and certainly those days on which the machine is necessarily idle either through mishap or in accordance with the universal custom of operating such a set, should not be taken into consideration in calculating the average production or capacity.

So that if we divide the actual production by the seventeen days of operation, we have an average daily production of over 2,000,000 cubic feet.

As to the fuel, we have the testimony of both Mr. White and Mr. Pederson and also of Mr. Guldlin that the consumption of fuel would have been vastly less, if it had been furnished in a shape and quality reasonably fit for use and would easily have been under thirty-five pounds to the thousand. And it will also be noticed that on each day that the machine was started in building up the fire a largely increased quantity of fuel per thousand feet was necessary to be used, but even under the adverse conditions, and considering the poor quality of the bricks, it would appear that the total carbon used was 1,373,885 pounds, and this divided by the number of thousands of cubic feet of gas made would show a consumption of only a little over thirty-nine pounds to the thousand; but we respectfully submit that out of this total consumption of fuel there should also be deducted the 126,565 pounds of so-called ash that was taken from the ash-chamber in the carburetter and the ash box in the generator, for the reason that the testimony shows that this ash was in fact unconsumed carbon, and there is no reason why it might not have been re-bricked and utilized, although Mr. Creighton denied that the gas company makes any use of it. However, it was not fuel consumed, and if we are given credit for that, it brings the consumption down to close to thirty-five pounds per thousand, and when we consider that the weighing process was only a matter of approximation, and of course was affected more or less by the changes in the weight of the wagons and other conditions, we think a substantial performance of the guaranty in this respect is practically made out, and considering the adverse condi-

tions under which the apparatus was operated, much more than substantial performance is certainly demonstrated.

As to the oil consumption there is no question. It is admitted that less than 4½ gallons of oil per thousand was used, but as to the candle power it is claimed that there was a breach of the warranty. But the overwhelming preponderance of the evidence in the case is that this provision of the contract was waived. It is an admitted fact that the gas company mixes the water gas produced at its plant and the oil gas in the same holder and aims to carry it for distribution at about nineteen candle power. It would then stand to reason that the practical degree of luminosity at which the gas company would desire to maintain the gas would be about nineteen candles. Both Mr. White and Mr. Pederson testified that the superintendents at the plant would make complaint if they carried the candle power above that figure, and requested that it be maintained at about that average, and both testify that that is the reason that it was not carried higher. Mr. White, Mr. Pederson and Mr. Guldlin explained that the candle power can easily be regulated by putting more oil in the carburetter or by reducing the proportion of carbon monoxide gas and that the candle power could easily have been maintained at from twenty to twenty-two in this apparatus if it had been so desired. (Pederson's testimony, pp. 458, 459, 460, 462; White's testimony, pp. 530, 541; Guldlin's testimony, p. 611.)

And moreover, Mr. White testified that Mr. Luckenbach told him that he would consider that requirement

of the guaranty complied with if the apparatus showed that it could produce 4.44 candles per gallon of oil used, which it is explained is the equivalent of producing twenty candle power gas using 4½ gallons per thousand cubic feet of gas made, and that the proper way to express candle power efficiency in a machine is in candles per gallon of oil used. (Pederson, p. 462; Wade, p. 341.)

Again, it is demonstrated by the admissions of their own chemist, Mr. Wade, that the photometer known as the Sugg, by which the candle power was measured during this test, necessarily involved an error of a very considerable degree against the water gas. He admitted the authority of a standard scientific work in which it was explained that the Sugg photometer was designed to measure coal gas, and that by reason of the difference in the height of the flame at which the various gases burn, the principal of the instrument is such that it cannot be depended upon for an accurate reading of other gases than coal gas. (Wade's testimony, pp. 329, 331 to 336.)

It is true that Mr. Wade claimed that he calibrated this particular instrument so that the error was not very great, but the fact that this water gas burns with a much shorter flame than the oil gas or the mixed gas, shows that he could not have calibrated it so that it would even approximate an accurate reading for the others without reading the luminosity of the water gas less to a very considerable degree. Mr. Wade admits an error of one-quarter of a candle, and our witnesses think it is considerably more. (Pederson's testimony, p. 463; Guldlin, p. 631.)

It is obvious then that even a reading of an average candle power of nineteen so nearly approaches the guaranty that under the circumstances, and especially in view of the most unfavorable conditions under which the test took place, more than a substantial performance of that requirement of the contract was attained.

No complaint whatever is made that the gas produced was not well fixed and non-condesable, nor is there any question of the adequacy of the scrubbers.

V.

The claim that there were mechanical defects in the apparatus was fully disproven and the finding of the court against the claim is supported by the evidence and conclusive.

It was alleged in the complaint, and an effort was made to show by the testimony of Mr. Creighton, that certain mechanical defects appeared in the machine at the end of the test, but it was proven by Mr. White and Mr. Pedersen that these defects were mere temporary troubles that easily could have been remedied, and that the construction company offered in good faith to restore the machine to perfect working order, if the company would accept, but they refused the offer. [Finding 11, p. 777, and finding 13, p. 779, testimony of McGillivray, p. 595, and Caldwell, p. 594, White, pp. 558, 560, Pederson, p. 451.]

VI.

The carburetter, as well as other parts of the apparatus, was of ample capacity to have met the guaranties under normal conditions.

In a desperate effort to account for the rapid falling off in the make of the machine as the test progressed, on some other hypothesis than the poor quality of the fuel, plaintiff's operators testify that the carburetter was not of sufficient capacity to handle the amount of oil fed into it during the "make" period.

The operators who advanced this opinion on behalf of the gas company were Messrs. Creighton and Young. But the complete lack of foundation for any such assertion is so completely shown by the record that we cannot believe that there was any sincerity in the expression of these opinions, and furnishes another reason why the testimony of the gas company's operators should be disregarded.

Let us first consider Mr. Creighton's testimony on this subject.

In the first place, he made no pretense of being an engineer. He had had no experience in water-gas manufacture except as an employee of the plaintiff in this action. For seven or eight years he was a foreman at the plant, and had occupied the position of assistant superintetnt for a few months prior to the trial of this case. [P. 354.] The only water-gas sets that he had ever handled were the sets at the gas company's plant [p. 684], and insofar as designing or constructing such plants were concerned, his experience was confined to remodelling some of the apparatus at this plant.

His school training was limited to the primary grades in the public schools, and he made no pretense whatever of ever having had any education in any science whatever. [P. 708.]

Now, as shown by Mr. Guldlin, one of the difficult problems of gas apparatus designing is the regulation of the proper size and proportion of the carburetter as well as the other units. He shows that this is one of the subjects that has been given the most careful study by expert engineers, and the principles that govern the regulation of those features in gas construction fixtures are jealously guarded as trade secrets, because they have been worked out upon a scientific basis by the most experienced and trained engineers. [P. 626.]

Yet Mr. Creighton, with his lack of experience or training, would have us accept his opinion against the carefully worked out conclusions of trained and experienced gas engineers, that the carburetter in this apparatus was too narrow for its height. He says: "There is something like 25,000 brick in the carburetter and superheater and the ratio there in a small area is trying to make too much volume in a small area in a given length of time." Accordingly, he concludes that the cross-section area of the carburetter is about 50% too narrow. [P. 699.]

Mr. Young was the superintendent of gas manufacture at the plaintiff corporation, and was, if anything, less qualified to express an opinion on this scientific problem than was Mr. Creighton. He had been in the employ of the gas company about two years, and a part of that time he was manager of operations and

then became superintendent of gas manufacture. Besides that, he had had two years' experience in a water-gas plant in the east, but that was the extent of his experience and the sole foundation for his knowledge of water-gas apparatus. [Pp. 730, 738.] He explains that if the carburetter is overloaded with oil it will show in the seal, and he says: "I only noticed the seal once or twice during the test. I saw oil on it once or twice. I did not notice it very often." Upon the strength of that he advanced the opinion that the carburetter was too small in diamter to handle the necessary quantity of oil to make two million cubic feet of gas in this set. [P. 736.]

But now, as against this, we have the testimony of O. N. Guldlin, the president of the construction company, who testified that he had been at the head of that organization since 1890; that the company has dealt extensively in the manufacture of gas works apparatus; that he himself had graduated as a mechanical engineer in Norway in 1879; that he took an advanced course in Munich, Bavaria, in mechanical engineering; that he came to the United States in 1880, and was for two and a half years with the Baldwin Locomotive Works in the engineering department, and in 1882 went into gas engineering, and has remained in that branch of the business ever since; that he had from that time to this continuously devoted his time to the designing of such apparatus and the manufacturing of the same. [Pp. 602, 604.]

That besides that, they have an engineering department, and that the plans of this apparatus were drawn

by himself and the head of the engineering department, a Mr. Thwing. [P. 627.] And Mr. Guldlin was the designer and patentee of a number of the features of this apparatus. [P. 605.]

Mr. Guldlin testifies that the capacity of the carburetter depends upon its cubic contents, although the rule for that is rather arbitrary, each company having its own rule. "We have our rules which our engineering department determines." And he expressed the opinion that this carburetter had ample capacity to handle a gas production of from two to three million cubic feet per twenty-four hours, and maintain the gas at more than twenty candle power. [Pp. 610, 611, 625 and 626.] And on page 628 he says: "The diameter of the carburetter is six inches larger than the superheater, but the height and cubic contents of the carburetter and superheater is larger than that of any other builder. Consequently, it gives a larger opportunity for handling the oil at the lowest possible temperature, and that is the feature of the machine—of being able to do so."

He admits, however, that other makers adopt different sizes of carburetters and different proportions, and that that is a matter of engineering opinion, but "my opinion on that subject is now generally adopted. The machines are being built on these lines of increased size of superheater and carburetter. It is adopted here and in England by the engineering firms." [*Id.* 628.]

And both Mr. White and Mr. Pederson express an unqualified opinion that the carburetter of this apparatus was of ample capacity to perform its part in the

production of largely in excess of two million cubic feet per day. [Pederson, pp. 768, 455, 456, 457, 458; and White's testimony, p. 556.]

But aside from the preponderance of the authority in favor of the opinion expressed by our engineers, that the carburetter was of ample capacity, we have a complete demonstration of that fact in the manner in which it operated during the test. It is an established fact that the moment a carburetter is overloaded with oil, that fact is immediately reflected by the deposit of oil in what is called the seal. As Mr. Guldlin stated, it is desirable to attain the largest production of oil gas in the carburetter at the lowest practicable heats. When the heats in the generator are carried to a very high temperature (as they are in oil-gas generators (it seems that the predominant gas produced is what is known as "methane" or marsh gas, which burns with a long flame, but a very low candle power. It is in this process that the excess of carbon is carried over with the gas and appears in the seal as lamp-black. But where the heats in the carburetter of the oil or water-gas generating machine are reduced to a lower temperature, the hydro-carbon gases that predominate belong to a series known as olefiant gases which are of high illuminating power. It is this reaction that is sought to be attained in the carburetter of a water-gas apparatus, and as a result, practically no lamp-black is produced, but the moment more oil is sprayed into the carburetter than it is capable of gasifying, it appears instantly in the seal. By watching the seal the operator is able to regulate the quantity of oil which it is

practicable to feed into the apparatus. Now, both Mr. White and Mr. Pederson were practical operators, and is it conceivable that they would overload the carburetter when that fact would have been perceptible in a moment? Is it possible that two experienced operators would deliberately overload their carburetter in a trial test of this character, when to do so would have the effect of clogging the apparatus and impairing its capacity? The evidence shows that they fed into the carburetter about one hundred gallons each run, and this was maintained as a uniform charge almost throughout the test. [See McDonald's testimony, p. 642.]

If this was an overload, they could easily have put in less, and while less load might have affected the candle-power to an extent, still it is in evidence that it could have been compensated for by spraying a part of the oil into the generator to be there gasified, as was done during the last days of the test, when the carburetor became clogged.

Now, all of the operators admit that the effect of overcrowding the carburetter is manifested in the seal by the appearance of oil; but strange to say, their superintendent, Mr. Young, would have us believe that it would not appear for two or three days, but when his attention was called to the fact that the oil when it is sprayed into the carburetter is immediately vaporized, if not gasified, and this must necessarily circulate through the carburetter and superheater and into the seal in just the same manner as do the gases, and therefore would appear in the seal immediately, his only

answer was that he thought the specific gravity of the vaporized oil was greater than the specific gravity of the gas and would thus move slower. [Pp. 739, 740.]

Such a proposition is absurd on its face, even to a layman, but further along he does admit that if the over-loading was serious it would appear instantly, and that the appearance of the seal is what guides the operator from run to run as to the quantity of oil to use. [P. 741.]

Mr. Creighton and Mr. McDonald both asserted that they did see oil in the seal, but McDonald does contradict the other gas company operators in this, that he admits that the oil would appear in the water of the seal pot after about one-third of the run. Remembering that the run was only six minutes, it is a flat contradiction of Messrs. Creighton and Young's predictions that it would only appear several days after the overloading. [McDonald, p. 641.] McDonald says that: "I should judge that the last ten days the machine ran I observed oil each run in the seal pot. That is, at the end of each run." [P. 642.]

Mr. Creighton testified that he would casually visit the machine once in a while during the test, and naturally he would go to the seal box, for that is the key of the machine, to see how it was balanced. "Sometimes I would see oil there and sometimes I would not and it would be normal." [P. 696.] Practically throughout the test we fed one hundred gallons of oil each run. [McDonald's testimony, p. 642.] And it would stand to reason that if that was an overcharge, and the carburetter had not the capacity to handle that

much, it would show every run instead of only occasionally, but both Mr. White and Mr. Pederson emphatically deny that there was any appearance of oil in the seal to indicate an overcharging of the apparatus. Pederson testified:

"My observations were to the opposite effect. When the carburetter is not taking care of the oil, it usually shows in the seal pot by showing a yellowish color in the water, and I frequently called the attention of the operator to the fact that the seal showed pretty good. At times a little tar substance would come over, and that would indicate that the apparatus was working properly, because the proper operation is to get your seal just running between tar and lamp-black without any oil." [P. 766.]

Mr. White testified that he looked at the seal very often each day.

"I never noticed the appearance to any great extent. There is always little blotches of oil coming over. The water was used over and over and over again in the gas company's set, as well as ours. They kept pumping it over, and it naturally was discolored, but no clear oil at any time."

"Q. Did you ever notice the appearance of any oil in the seal that would indicate to you as a gas operator that the machine was being overcrowded with oil? A. I never did. No, sir."

And besides that, the record of the apparatus during the test in production of gas would certainly refute any theory that it had not the capacity to handle a production of gas largely in excess of 2,000,000 cubic feet per day. Commencing with the 17th, the apparatus made over 2,000,000 cubic feet per day until the 25th—a period of eight days, and it is established, as we have before shown, that it is almost unheard of to operate

such an apparatus more than six days without shutting down to burn out the carburetter. If then the carburetter did not have ample capacity to handle a production of more than 2,000,000 cubic feet per day, how is it possible that it did so for eight days under such grossly abnormal and disadvantageous conditions? It did clog up, to be sure, before the test ended, but its record for those eight days conclusively shows that it was not because it was not gasifying the oil, but because of the tremendous amount of fine carbon that blew over from the generator.

In the course of their herculean efforts to excuse the character of the fuel as being the primary cause of all the difficulties of the test, and in the endeavor to support their theory that the inability of the carburetter to gasify the oil was the trouble, the gas company's operators have had the audacity to claim that there was very little fine stuff passed over from the generator to the carburetter. [McDonald's testimony, p. 652; Creighton's testimony, p. 700.]

In view of the conclusive proof of the vast quantities of fine lamp-black that was dumped into this machine throughout the test, and in view of the admitted fact that on that account the fire packed and it was necessary to blast the air through the apparatus under great pressure, and in view of the vast quantities of unconsumed fine carbon that were removed from the dust chamber in the carburetter, it follows necessarily that large quantities of such material must have blown over into the carburetter. Besides that, Messrs. White and

Pederson are the men who actually removed the checker-brick in the carburetter while the machine was shut down three days during the test, and they would surely know what the deposit was upon the bricks, and they testify that it was an accumulated mass of this fine carbon dust. It is of course true that in the heavy California petroleum there is a large percentage of asphaltum, and the deposit upon the checker-brick is necessarily heavy as compared with the eastern lighter oils of paraffin base. But even so, the results obtained in this test afford a complete demonstration of the correctness of the statements of our witnesses that the carburetter would never have become clogged, or the production of gas materially decreased as the test proceeded, except for the overwhelming deposit of the fine carbon that blew over from the generator.

Considerable stress was placed by counsel for plaintiff, in the examination of witnesses, upon the obligation undertaken by the construction company in the contract of July 12, to provide ample means for the collection and easy removal of dust and fine carbon carried from the generator to the carburetter, and the intimation was that the failure of the apparatus to accomplish the results expected was due to the construction company's failure to comply with this provision of the contract. But we do not see how plaintiff can consistently rely upon any such claim in view of the testimony of their own witnesses that the means furnished did provide for the collection and easy removal of that material, and their failure to plead any such breach of the contract.

But however that may be, it is in evidence that this carburetter was equipped with a patented device invented by Mr. Guldlin, and which did have the effect of collecting large quantities of the dust and fine carbon which blew over, and it is the consensus of opinion of all the witnesses that under normal conditions ample provision was made against this menace. But counsel have called attention to the fact that this dust collection chamber was already in the carburetter as it was originally constructed, and, therefore, could not be said to be a *change* provided to accomplish this end. [Cross-examination of Mr. Pederson, p. 480.] Certainly, however, it cannot be contended that this requirement to provide against this obstacle confined the construction company to the making of any particular change in any particular apparatus, nor obviously did it contemplate that ample provision should be made for the collection and removal of abnormal quantities of such dust arising through the fault of the gas company to an extent far beyond anything that could have been reasonably anticipated. It was surely sufficient if the construction company took proper precaution and devised reasonable means, whether in the carburetter or elsewhere, to take care of the situation, and Mr. Pederson explains that they did make a change in the connection between the carburetter and the generator which had the effect of providing an additional receptacle for dust and carbon blown over. [Pp. 481-486.]

But, besides that, it is also in evidence that ample means for the prevention of such dust being blown over was particularly in the minds of the designers

when the new generator was constructed. Mr. Guldlin has made a full explanation of this feature of the apparatus. He says that the effort to take care of the dust was on the line of attaining the end without specifically attempting to build an attachment to the carburetter. "In other words, in the reconstruction of the generator, we knew that by materially increasing the grate area we would reduce the necessary flow of air through the fuel bed, which would have a direct effect of not carrying any excessive amount of dust over." [P. 621.] He explains the very obvious truth that if instead of having a deep, concentrated fuel bed through which the air must be forced at high velocity in order to inject the necessary amount of oxygen to develop a large production, the area of the grate bars was largely increased, or, as in this case, doubled, the volume of air to be brought in contact with the surface of the carbon could be very largely increased, and yet the velocity of the blast largely diminished. Of course, the slower the air is passed through the fuel bed, the less carrying power it would have, and consequently diminish the amount of dust which the operator would have to contend with in the carburetter.

He expresses the unqualified opinion that under normal conditions, with an ordinary loose and porous fire bed, a much larger capacity could have been obtained and the trouble from dust practically eliminated. [Pp. 620 to 623.]

But, as explained by Mr. White and Mr. Pederson, the packing and smothering of the fire by the constant inrush of this disintegrated and crumbled fuel made it

necessary to force the air through the fuel at a very high velocity in order to get it through at all, and thus it was that such abnormal quantities of the dust was carried over into the carburetter as to finally block operations. [Pederson's testimony, pp. 523, 524; also p. 531; White's testimony, pp. 548 and 552.]

Besides, as we have already shown, provision was made for removing the dust by perforation of the chutes, and there is no doubt that this would have answered the purpose under ordinary conditions.

It is quite clear, therefore, that no fault could be attributed to the construction company in this regard, nor is there the slightest basis for any contention of defect in the apparatus in so far as this requirement of the contract was concerned.

Conclusion.

On the whole, it is respectfully submitted that the evidence presented in the case afforded a complete demonstration, not only that the construction company had nothing like a fair opportunity to show what the apparatus was capable of doing, but also that if in fact any reasonable opportunity had been accorded the defendant, the apparatus would largely have exceeded the minimum capacity mentioned in the guaranty. It is evident that our operators, while endeavoring to their utmost to give the apparatus a fair demonstration under favorable conditions, and to avoid controversy and litigation, were nevertheless working in an atmosphere of hostility and surrounded by spies watching for an opportunity to distort any circumstances to

the disadvantage of the apparatus, or to record any statement that might be warped into an admission of failure, or a justification for the gas company's conduct. (To be convinced of this it is only necessary to read the testimony of their inspector, Carey, which will be found in the record from pages 658 to 679.) We think that in view of the tremendous investment that the construction company had in this machine, and the large additional expense which it went to in the effort to satisfy the gas company, and the obvious good faith of its operators throughout the history of the transaction, entitled the defendant to ideal conditions under which to test the apparatus, but it is shown beyond question that they never insisted upon anything other than an opportunity reasonably favorable. The overwhelming preponderance of the testimony is that they did not get anything like a fair chance, and therefore never had a test under the contract.

We have, of course, under the rules, been compelled to prepare this brief without having had the advantage of knowing definitely upon what theory of the case plaintiff in error will place its reliance, and have therefore endeavored to anticipate all points that may be presented. In doing so it is quite probable that we have prolonged the brief in the discussion of questions that may not arise, but nevertheless we have thought it advisable, even at the risk of protracting the brief to unpardonable lengths, to present our views in a general way, at least, upon all phases of the case, and have thought it would be of assistance to the court to quote quite extensively from the evidence. We have

done so largely with the view of making it plain to the court that the vital questions in the case are questions of fact and depend exclusively upon reaching conclusions from conflicting evidence and with a large preponderance of proof in favor of the findings of the court. It is needless to say that under such circumstances every presumption is in favor of the findings of the trial court, and its findings will be accepted by this court unless manifestly without any support in the record.

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law when properly presented in a bill of exceptions can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment."

Empire State Mining Co. v. Bunker Hill Mining Co., C. C. A., 9th Circuit, Judge Ross delivering the opinion, 114 Federal 417, and cases cited, 418;

McIntosh v. Price, C. C. A., 9th Circuit, Judge Gilbert delivering the opinion, 121 Fed. 216;

San Fernando Copper Co. v. Humphrey, C. C. A., 9th Circuit, Judge Gilbert delivering the opinion, 130 Federal 298, and cases cited, pp. 300 and 301.

Respectfully submitted,

OSCAR A. TRIPPET &
WARD CHAPMAN,
Attorneys for Defendant in Error.

No. 2159.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Los Angeles Gas and Electric Company, a corporation, *Plaintiff in Error*, *vs.* The Western Gas Construction Company, a corporation, *Defendant in Error.*	

REPLY BRIEF FOR DEFENDANT IN ERROR.

Counsel for plaintiff in error at the argument of this case having advanced two propositions which have not been fully met in our opening brief, we asked and were granted leave to file this supplement to our brief.

The points made were (1) that the court having found that the apparatus had not a capacity in excess of two million cubic feet of gas per day, plaintiff should have been given judgment for the $823.45 mentioned in the second paragraph of the supplemental contract [Record, p. 41], and (2) that the court erred in taking

into consideration the correspondence and the circumstances before the parties at the time the original contract was made, in arriving at the true meaning of the contract.

Upon the first of these propositions it is sufficient to say that this suit was brought to recover the sum of $26,823.45, together with certain expenses incurred by plaintiff in removing the apparatus from its premises, upon the theory that a test of the apparatus had been had in accordance with the contract of July 12, 1909, and by that test a capacity of less than two million cubic feet per day demonstrated, as a result of which plaintiff was, under the contract, entitled to the return of that sum of money under the provisions of the third paragraph of the contract. [Record, p. 43.] Plaintiff's right to recover is measured, therefore, entirely by the contract, but every line of the contract shows that the right of either party to receive any money under the contract was entirely dependent upon the result of the test; plaintiff's right to recover the $823.45 was made to depend upon the failure on the part of the construction company to bring the apparatus to a gas making capacity of more than two million cubic feet *in said test.* But the court has found, in the most unequivocal language, that said test never took place, and moreover, that the failure to test the apparatus as provided in the contract was due to the fault of plaintiff. [Finding XII, p. 779; finding XVI, p. 781; also p. 785.]

Neither is the finding of the court that the apparatus did not have a capacity in excess of two million cubic feet of gas per 24 hours inconsistent with the findings

of the court that there never was a test as provided in the contract.

That finding [par. XVI, p. 1785] was made in response to the allegations of our cross-complaint whereby we sought to recover the whole purchase price on the theory that the apparatus had the maximum capacity mentioned in the contract. But the court, as said before, in response to the issues made by the complaint and the answer thereto, has found that owing to the fault of the Gas Company that test was never had, "nor was the same such a test as would properly or fairly indicate or determine the capacity or economy of operation of said apparatus for 20 or more consecutive days or as a permanent operating apparatus or otherwise." [Record, p. 785.]

Having reached this conclusion, and in view of the fact that the contract provides that the capacity was to be determined solely by the 20 day test provided in the contract, it followed that there was no evidence from which the court could judge what capacity, if any, the apparatus had in excess of two million cubic feet, and the court therefore concluded that defendant was not entitled to recover on its cross-complaint, and consequently could not find that the apparatus had a capacity in excess of two million cubic feet per day.

But whatever the finding of the court might have been with respect to the capacity of the machine, it is still true that in the absence of the test called for by the contract plaintiff was entitled to recover nothing. The completion of the 20 day test as prescribed by the contract was a condition precedent to the right of either

party to recover anything upon the contract. Whether the apparatus in fact had a capacity of one million or three million cubic feet per day, was not the measure of the right of either party to recover; it was made to depend upon the capacity shown in the test prescribed by the contract, and in the absence of that test, certainly the Gas Company, to whose fault it was due, can recover nothing.

With respect to the second proposition, we make the following answer:

1. That plaintiff is not now in a position to complain of the admission and consideration by the court of the evidence of the circumstances surrounding the parties at the time the original contract was made, and the correspondence and negotiations which led up to the making of the same, with a view to arriving at what the parties meant by the use of the term "lamp black fuel," for this reason:

That plaintiff not only made no objection to any of the evidence of the circumstances, declarations and negotiations which took place at the time the contract was made, introduced by us for the sole purpose of proving that it was intended that the lamp black should be furnished bricked in a substantial form, but plaintiff's counsel themselves also offered in evidence all of the correspondence relating to the character of the fuel for the same purpose of throwing light upon the meaning of the contract in that regard.

At the outset of the trial Mr. Goudge announced that "the negotiations between the parties and their situation with reference to this contract will be more briefly

and clearly shown by the correspondence that took place between them, and we have a series of letters that tell the whole story, which we will identify and introduce." [Record, p. 160.]

Thereupon, commencing with a letter written more than a month before the original contract was made, plaintiff's counsel read in evidence a series of letters, all bearing upon the question of what the parties had in mind when they prescribed the use of "lamp-black fuel" in this generator. And in the course of the reading of the letters Mr. Goudge further announced the purpose for which they were introduced, as follows:

"The object of this testimony is not to show or attempt to show that we performed the contract on our part prior to the execution of this contract. We don't care whether we did or not, and we don't think the court is concerned whether we did or not prior to the making of this supplemental contract. And I will omit parts of the letter unless counsel desires the whole letter. I want to confine this letter merely to the point of what the expression 'lamp-black,' as used in the original and supplemental contract, means, and also that the parties agree as to what it meant and knew what it meant, and there is a part of this letter from the Western Gas Construction Company which recites and admits that the lamp-black referred to in the contract is a by-product of our manufactured gas." [Record, p. 184.]

Besides that, counsel for plaintiff examined Mr. Luckenbach concerning negotiations which took place at the time the original contract was made, and in the introduction of our evidence we proved by Mr. Pederson what information he had concerning the character of the fuel, and all of the circumstances surrounding the parties at the time it was made [p. 400 *et seq.*], and we

proved by Mr. Guldlin the fact that samples were submitted of the quality of the material, and that the guaranties were based upon the information thus obtained [p. 602 *et seq.*], and all of this evidence was admitted without the interposition of any objection on the part of plaintiff's counsel nor any suggestion that it was deemed incompetent as being an attempt to change or add to the contract by parol. But as said before, both parties apparently agreed that the court had the right to consider all this testimony in arriving at the true meaning of the contract. Accordingly, the court has found just what the situation of the parties was, and what information the defendant had at the time these guaranties were made, and that defendant relied upon the facts thus presented in making the guaranties. [Finding II, pp. 770-772.]

It is an inflexible rule of this court, as declared by Judge Ross in an opinion delivered in Empire State Mining Company v. Bunker Hill Mining Company, 114 Fed. 417, that:

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment."

Not only is no question of law raised as to the admissibility of the evidence which was offered to explain the meaning of the contract, either through exceptions

taken to any ruling of the court as to the admissibility of the testimony or in any other manner, but as before shown its admissibility was practically agreed to by both parties. We therefore respectfully submit that these questions cannot be raised for the first time on this appeal.

In the second place, even if the question of the admissibility of the testimony was properly before this court, it still is not true that the court would be confined to a consideration of the correspondence and facts existing at the time the contract of July 12, 1909, was made—because it is quite manifest that in the contract of July 12, 1909, the parties contracted to use fuel of precisely the same quality that was referred to in the original contract. Throughout the contract of July 12, 1909, the parties refer back to the original contract for a description of the material to be used in the final test, and consequently we had a right to ascertain what the parties meant when they used the expression "lampblack" in the original contract by reference to the circumstances surrounding the parties at that time, in order to determine what the same expression meant in the second contract.

With this view also counsel for plaintiff apparently coincided at the trial in the course of a discussion as to a part of the correspondence after the original contract was made, when Mr. Goudge said:

"This (letter) is material because it is from the Western Gas Construction Company, and refers to the manner in which the test shall be applied to this apparatus. When the supplemental contract was made, *no new tests were prescribed.* It still had to have a certain make of

gas for a certain quantity of fuel; and the *same kind of fuel,* the same kind of oil; and what was a test under the first contract would be a test under the second." [Record, p. 189.]

We therefore respectfully submit that it was not only the duty of the court to take into consideration the circumstances surrounding the parties, their correspondence and declarations, at the time the original contract was made, as well as at the time the supplemental contract was made, but the appellant also at the trial of the case acquiesced in that view, and cannot now for the first time question the competency and relevancy of that testimony as an aid to the interpretation of the contract.

Respectfully submitted,

Oscar A. Trippet,
Ward Chapman,
Attorneys for Defendant in Error.

No. 2171

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(In Three Volumes.)

JAMES T. BARRON,

Appellant,

vs.

CLAIRE J. ALEXANDER,

Appellee.

VOLUME I.

(Pages 1 to 256, Inclusive.)

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

FILMER BROS. CO. PRINT, 330 Jackson St., S. F., Cal.

No. 2171

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(In Three Volumes.)

JAMES T. BARRON,

Appellant,

vs.

CLAIRE J. ALEXANDER,

Appellee.

VOLUME I.

(Pages 1 to 256, Inclusive.)

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

FILMER BROS. CO. PRINT, 330 Jackson St., S. F., Cal.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Appellant's Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, in the State of California, under the appeal heretofore perfected in the above-entitled court and cause, and include in said transcript the following proceedings, pleadings and papers on file with you, therein, to wit:

1. Original Complaint;
2. Summons;
3. Restraining Order Dated March 22, 1911;
4. Original Answer;
5. Motion to Strike Part of Original Answer;
6. Order Denying Motion to Strike;
7. Order Dissolving Temporary Restraining Order Mch. 30, 1911;
8. Reply to Original Answer;
9. Amended and Supplemental Complaint;

10. Answer to Amended and Supplemental Complaint;
11. Reply to Answer to Amended and Supplemental Complaint;
12. Order Refusing to Set Aside Opinion and Grant a New Trial;
13. ~~Order Refusing and Denying Plaintiff's Tendered Findings of Fact & Conclusions of Law;~~
14. Defendant's Tendered Findings of Fact and Conclusions of Law;
15. ~~Order Made by Court in Regard to Tendered Findings of Defendant;~~
16. Findings of Fact and Conclusions of Law Made by the Court;
17. Order Denying Motion to Set Aside Findings of Fact and Conclusions of Law Made by the Court;
18. Order Made by Court July 1st, 1912, Overruling Tendered Findings of Plaintiff and Allowing Exceptions to Findings Made by the Court;
19. Decree Made by the Court;
20. Motion to Make Certain Exhibits Part of Record and Permitting Transfer of Some of Original Exhibits to [1*] *to* the Clerk of Circuit Court of Appeals;
21. Order Made by Court Making Exhibits Part of Record and Ordering Transfer of Part of Original Exhibits to Clerk of Circuit Court of Appeals;

*Page-number appearing at foot of page of original certified Record.

22. Notice of Settling Bill of Exceptions, etc., and Return of U. S. Marshal Attached Thereto Showing Service of Same;
23. Plaintiff's Assignment of Errors and Certificate of U. S. Marshal Attached Thereto Showing Service of Same;
24. Petition for Appeal and Order Attached Thereto Allowing Same;
25. Order Setting Amount of Bond on Appeal;
26. Bond on Appeal;
27. Citation;
28. Order Extending Return Day Under Citation;
29. Proof of Service of Citation;
30. Bill of Exceptions;
31. Stipulation Filed July 24, 1912;
32. Order Re Forwarding Original Exhibits Filed July 24, 1912;
33. Stipulation August 1, 1912.

WINN & BURTON,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Original. No. 840–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Praecipe. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska, Office ————. Filed Jul. 12, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [2]

In the United States District Court for the District of Alaska, Div. No. 1, at Juneau.

No. ——.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Complaint.

To the Honorable THOS. R. LYONS, Judge of the Above-entitled Court.

Comes now the above-named plaintiff, by his attorneys, Winn & Burton, and complaining of the above-named defendant for cause of action, alleges:

1.

1st. That on, to wit, prior to June, 1909, one V. A. Robertson, located and had surveyed, under the Soldiers' Additional Homestead Laws pertaining to the District of Alaska, the following described tract or parcel of land, situate, lying and being on the south shore of Chatham Straits, about five miles north of Hawk Inlet, in the District of Alaska, and more particularly described as follows, to wit, namely:

Situate on Chatham Strait about two miles south of Funter Bay, Alaska:

Beginning at Cor. No. 1 M. C., from whence U. S. L. M. No. 804 bears S. 74° 02′ W. 5.78 chains; thence meandering shore line of Chatham Strait, 1st course, S. 80° 51′ E. 6.15 chains; 2d course, N. 86° 05′ E.

5.89 chains; to Cor. No. 2; thence north 4.36 chains to Cor. No. 3; thence west 11.95 chains to Cor. No. 4; thence S. 3.78 chains to Cor. No. 1 M. C., place of beginning.

Area embraced within said survey, 5.27 acres. [3]

2.

Thereafter, and on, to wit, the 16th day of June, 1909, the official plat and the field-notes of said above-described lot or parcel of land were approved by the Surveyor-General for the District of Alaska, and said plat so approved as aforesaid was forwarded by the Surveyor General to the Local Land Office at Juneau, Alaska, and said survey is designated and known as U. S. Nonmineral Soldiers' Additional Survey No. 804.

3.

That on, to wit, *on* or about the first day of March, A. D. 1911, for value received, the said V. A. Robertson conveyed by good and sufficient deed in writing the above-described tract, lot or parcel of land embraced within said U. S. Nonmineral Survey No. 804 aforesaid to James T. Barron, the plaintiff herein; that said James T. Barron is now the owner of said land embraced within said U. S. Nonmineral Survey No. 804.

4.

That the purpose and object in surveying said land and having the plat and field-notes thereof approved by the surveyor-general is to have the same patented under the laws of the United States and the regulations of the Land Department; that said James T. Barron and his predecessor in interest, in

having said survey made intend to make all necessary proof in order to obtain a U. S. Patent for the same and to purchase the land from the United States Government by means of Soldiers' Additional Scrip.

5.

That at the time of the entry upon said land by the plaintiff and his predecessor in interest, the same was Government land, unoccupied, unappropriated and open to entry, and the approval of said surveyor-general of the District of Alaska is proof that such land was so open to entry, as aforesaid. [4]

6.

That said land embraced in said survey No. 804 borders upon the navigable waters of Chatham Straits in the North Pacific Ocean, in the District of Alaska.

7.

That on, to wit, *on* or about the 14th day of March, 1911, the above-named defendant, his agents, servants and employees, entered upon the above-described survey No. 804 and upon the navigable waters directly in front of said described land with a pile-driver and piles and commenced to drive piles upon the tide lands and waters immediately in front of and abutting upon the piece or parcel of land above described and embraced within said survey No. 804; that ever since said time they have been and they are now driving piles upon said tide land and water immediately in front of and abutting said piece or parcel of land; that the driving of said piles in front of plaintiff's land as aforesaid interferes

with and obstructs his free egress and ingress to the navigable waters of said Chatham Straits, and his right of free access to deep and navigable waters of said Chatham Strait.

8.

Plaintiff further alleges the fact to be that the driving of such piles as aforesaid in the manner herein described is done by the defendant knowingly, maliciously and wrongfully and with full knowledge of plaintiff's rights, and that said defendant will proceed to complete his work of driving such piles unless restrained by this Honorable Court; that the said piling so driven by the defendant as aforesaid is evidently for the purpose of constructing a fish-trap.

9.

That plaintiff is informed and believes that the defendant does not own any upland on or near or in the vicinity of said fish-trap that he is constructing as aforesaid. [5]

10.

That plaintiff further alleges that inasmuch as the defendant has commenced the building and constructing of said trap in front of plaintiff's land out in and to and over the waters of Chatham Straits to deep water, and is continuing and will continue to do so unless restrained by this Honorable Court, it is imperative that action be taken at once by this Honorable Court without notice to said defendant or any of his employees, servants or agents, and that a temporary restraining order or order to show cause be granted herein without notice, for the rea-

son that if notice is given to said defendant, his agents, servants or employees, they will proceed at once to complete the construction and erection of said trap and complete the same before any relief can be granted herein.

11.

That by reason of the facts herein stated an emergency exists for the granting of a temporary injunction or restraining order pending this action, without notice to said defendant; that the plaintiff has no plain, speedy and adequate remedy at law.

WHEREFORE, plaintiff prays judgment as follows: That a temporary restraining order be granted herein, restraining the defendant, his servants, agents and employees, from building, erecting, constructing or improving upon the tide lands or navigable waters of Chatham Straits immediately in front of the tract, parcel or plat of land embraced within the exterior boundary lines of said Survey No. 804, or in any wise interfering with the plaintiff's right of possession or use of said tide lands or grounds between the uplands owned by this plaintiff and the navigable water of Chatham Straits; also to be enjoined and restrained from in any wise interfering with the plaintiff's right of access to and from his uplands to deep and [6] navigable waters of said Chatham Straits pending this action.

2d. That said defendant, his agents, servants and employees, be restrained in the manner aforesaid until the respective rights of the said parties plaintiff and defendant be determined by this proceeding; and that upon final hearing said injunction

be made permanent; and for his costs and disbursements herein.

WINN & BURTON,
Attorneys for the Plaintiff.

United States of America,
District of Alaska,—ss.

I, Fred Barker, being first duly sworn, on oath, say: That I am the agent and superintendent of plaintiff in the above-entitled action; that I have read the foregoing . . . . and know the contents thereof and believe the same to be true; that I make this verification because the plaintiff is without the District of Alaska.

FRED BARKER.

Subscribed and sworn to before me this 22d day of March, A. D. 1911.

[Notarial Seal] NEWARK L. BURTON,
Notary Public for Alaska.

[Endorsed]: Original. No. 840. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Complaint. Filed Mar. 22, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———— Office; Juneau, Alaska. Office No. ————. [7]

In the District Court for the District of Alaska, Division No. 1.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Summons.

To Claire Alexander, the Above-named Defendant, ————, Defendant, Greeting:

IN THE NAME OF THE UNITED STATES OF AMERICA, You are hereby commanded to be and appear in the above-entitled court, holden at Juneau, in said Division of said District, and answer the complaint filed against you in the above-entitled action within thirty days from the date of the service of this summons and a copy of the said complaint upon you, and, if you fail so to appear and answer, for want thereof the plaintiff will apply to the court for the relief demanded in said complaint, a copy of which is served herewith.

AND YOU, the United States Marshal of Division No. 1 of the District of Alaska, or any deputy, are hereby required to make service of this summons upon the said defendant and each of them as by law required, and you will make due return hereof to the Clerk of this Court within forty days from the date of delivery to you, with an indorsement hereon of your doings in the premises.

IN WITNESS WHEREOF, I have hereto [8] set my hand and affixed the seal of the above court this twenty-second day of March, A. D. 1911.

[Court Seal] H. SHATTUCK,
Clerk.
By H. Malone,
Deputy.

United States of America,
District of Alaska,
Division No. One,—ss.

I hereby certify that I received the within summons on the 22d day of March, 1911, and that I served the same at Funter Bay, Alaska, on the 23d day of March, 1911, by delivering a copy thereof prepared and certified by N. L. Burton, attorney for the plaintiff herein named, together with a copy of the complaint in said action also prepared and certified by the said N. L. Burton, to the within named defendant, Claire Alexander, personally and in person.

H. L. FAULKNER,
United States Marshal.
By W. D. MacMillan,
Office Deputy.

MARSHAL'S FEES:

1 service.....	$ 3
Expense of trip, Juneau to Funter Bay.....	35.00
	38.00

Fees paid by plaintiff.

[Endorsed]: Original. No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Summons. Filed Mar. 24, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska. Office No. ———. [9]

In the United States District Court, District of Alaska, Division No. 1, at Juneau.

No. 840-A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Restraining Order.

United States of America, to Claire Alexander, the Above-named Defendant, Greeting:

The above-named plaintiff having filed his complaint in this court against the above-named defendant praying for an injunction against said defendant requiring him to refrain from certain acts in said complaint described and hereinafter more particularly mentioned, upon reading said complaint and affidavit filed in connection therewith in this action, both of which are duly verified and sworn to, and it satisfactorily appearing to this Court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor;

NOW, THEREFORE, you, the said Claire Alexander, your agents, servants and employees, and each and every of you, are strictly commanded until further order of this Court to absolutely desist and refrain from building or erecting, improving or constructing upon any of the tide lands or water in front of the property and land embraced in U. S. Nonmineral Survey No. 804 belonging to and owned by the plaintiff herein, which said land is more particularly described as follows, viz.:

Situate on Chatham Strait, District of Alaska, about two miles south of Funter Bay, Alaska: Beginning at Cor. No. 1 M. C., from whence U. S. L. M. No. 804 bears S. 74° 02′ W. 5.78 chains; thence, 1st course, meandering shore Chatham Strait, S. 80° 51′ E. 6.15 chains; 2d course, N. 86° 05′ E. 5.89 chains to Cor. M. C. No. 2; thence North 4.36 chains to Cor. No. 3; [10] thence West 11.95 chains to Cor. No. 4; thence S. 3.78 chains to Cor. No. 1, place of beginning. Area, 5.27 acres.

AND you are hereby required to show cause before this court on the 27th day of March, 1911, at the hour of 10 o'clock A. M., why this order of restraint should not continue and remain in full force and effect against you during the pendency of this action as prayed for in the complaint of plaintiff filed herein, a copy of which complaint will be served upon you.

This order to go into effect upon the filing by plaintiff of their undertaking with one or more sureties to the effect that they will pay all costs and disbursements that may be decreed to defendant,

and such damages, not exceeding the sum of $1500.00 dollars, as they may sustain by reason of the said order, if the same be wrongful or without sufficient reason or cause.

Done in open court this 22d day of March, A. D. 1911.

THOMAS R. LYONS,
Judge.

United States of America,
District of Alaska,
Division No. One,—ss.

I hereby certify that I received the within order on the 22d day of March, 1911, and that I served the same at Funter Bay, Alaska, on the 23d day of March, 1911, by delivering a full, true and correct copy thereof to the within named defendant, Claire Alexander, personally and in person.

Dated at Juneau, Alaska, March 24, 1911.

H. L. FAULKNER,
United States Marshal.
By W. D. MacMillan,
Office Deputy.

Marshal's Fees: 1 service, $3.
Fees paid by plaintiff. [11]

[Endorsed]: Original. No. 840–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Restraining Order. Filed Mar. 24, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. John R. Winn. Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska, Office No. ——. [12]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Answer.

Comes now Claire Alexander, the defendant herein, and answering plaintiff's complaint, alleges:

I.

Answering paragraphs I, II, III, IV and V of said complaint, defendant alleges that he has not sufficient knowledge or information to form a belief as to the truth of the allegations therein; therefore he denies the same.

II.

Answering paragraph VI of said complaint, defendant admits the same.

III.

Answering paragraph VII of said complaint, defendant admits that he has driven piles and constructed a fish-trap in the navigable waters in Chatham Strait in front of land which he is informed plaintiff claims and which is called Nonmineral Survey No. 804. Further answering said paragraph No. VII, defendant denies that on March 14, 1911, or at any other time, he or his agents, servants, or

employees or any of them ever entered upon said Survey No. 804; denies that he or any of his agents, servants or employees ever entered upon the tide lands in front of said Survey No. 804 with a pile-driver and piles and commenced to drive piles upon said tide lands; [13] denies that ever since that time they or any of them have been and are now driving piles upon said tide lands immediately in front of and abutting said piece of land called Survey No. 804; denies that the driving of said piles in front of plaintiff's land interferes with and obstructs plaintiff's free egress or ingress to the navigable waters of Chatham Strait or his right of free access to deep and navigable waters of Chatham Strait.

IV.

Answering paragraph No. VIII of said complaint, defendant admits that he has driven piles in the navigable waters of Chatham Strait in front of said Survey No. 804 for the purpose of constructing a fish-trap, and that he has constructed said trap in said waters and except as herein admitted, defendant denies each and every allegation and each and every part thereof in said paragraph No. VIII contained.

V.

Answering paragraph No. IX of said complaint, defendant admits the same.

VI.

Answering paragraph No. X of said complaint, defendant denies the same and each and every part thereof.

VII.

Answering paragraph No. XI of said complaint, defendant denies the same and each and every part thereof.

And as an affirmative defense to the matters and things charged in said complaint, defendant alleges:

A.

That he is a citizen of the United States, over twenty-one years of age and a resident and inhabitant of the territory of Alaska; that defendant has for many years been engaged in the business of salmon fishing in the waters of Southeastern [14] Alaska; that he and his associates are now engaged in such business and have invested large sums of money in steamboats, fishtraps, and other property and appliances used in their said business.

B.

That Chatham Strait is a large arm of the Pacific Ocean, navigable for all sizes of vessels, and is about two hundred miles in length and has an average width of about fifteen miles; that at the place where defendant has constructed his fish-trap hereinafter described said Chatham Strait is about twelve miles in width; that in all parts of said Strait the ocean tides regularly ebb and flow; that the waters of said Chatham Strait abound in fish, salmon being especially abundant and said waters constitute a fishery, free, public and common to all persons.

C.

That on or about the 1st day of Nov., 1910, defendant and others who are interested in business with

him located a place in said Chatham Strait about two miles south of Funter Bay on the shores of Admiralty Island and in the open navigable waters of said Strait for the purpose of constructing a fish-trap for taking salmon; that said place so located by defendant, is a valuable fish-trap site for the reason that large schools of salmon abound in the immediate waters; that the place so selected and located by defendant as aforesaid, was unoccupied and unappropriated and was not being used by anyone engaged in the fish business or in any other kind of business except commerce and navigation; that it was open, navigable water; that after so locating said place as aforesaid, defendant and his associates made soundings and thereafter, to wit, on Mch. 14, 1911, at great expense procured piles [15] and a pile-driver and steamboat, all of which defendant used in the construction and erection of a fish-trap upon the location above mentioned; that defendant drove said piles and constructed said trap entirely in the open, unoccupied, unappropriated, navigable waters of said Chatham Strait below low-tide lands of Admiralty Island; that the place where said trap was so constructed and driven by defendant is, as defendant is now informed, directly in front of land claimed by the plaintiff and called Nonmineral Survey No. 804.

D.

Defendant further alleges that neither in the building and construction of his fish-trap at the place above described, nor in the operation of the same, has he attempted to interfere with the plaintiff or

anyone else; that he has not threatened to interfere nor attempted to interfere, and does not now intend to interfere with plaintiff in the use of his *his* land or property, nor his rights to fish in the navigable waters of Chatham Straits; that defendant, in the location of said trap site and in the lawful pursuit of his right to fish in the navigable waters of the ocean where his said trap is constructed, has expended more than Four Thousand ($4,000) Dollars, and the value of his said trap, including the profits which defendant expects to make during the season of 1912, is more than Ten Thousand ($10,000). Dollars.

E.

That plaintiff is not engaged in fishing with traps or any other devices or appliances in or near the said place where defendant has constructed his said trap, and the acts of the defendant do not interfere with, damage or effect the plaintiff in any manner; that the defendant's said fish-trap in no manner obstructs plaintiff's right of access [16] to navigable water, nor his right of ingress or egress over the shore or tide land in front of the upland which he claims and which is called Nonmineral Survey No. 804.

F.

Defendant further alleges that the land covered by Survey No. 804 and claimed by plaintiff was at the time defendant drove his said trap and is now wholly unoccupied, unimproved and uncultivated; that there are no canneries or cannery buildings or wharves of any kind located on said land, and no

buildings or improvements of any kind or description located on said land, except one small unoccupied board shack, costing not to exceed Fifteen ($15) Dollars; that said land is covered with a dense growth of forest; that said land so claimed by plaintiff is of no value whatever for agricultural purposes or any other purpose.

Defendant verily believes that plaintiff has located and is holding said land for the sole and only purpose of attempting to prevent all other persons from exercising their right of fishing in the navigable waters in front of said land.

WHEREFORE, having fully answered, defendant prays that the temporary restraining order heretofore made be dissolved and that defendant be dismissed with his reasonable costs.

Z. R. CHENEY,
Attorney for Plaintiff.

United States of America,
District of Alaska,—ss.

I, Clairance J. Alexander, being first duly sworn, on oath, say: That I am the defendant in the above entitled action; that I have read the foregoing Answer and know the contents [17] thereof, and believe the same to be true; that I make this verification because .....

CLARENCE J. ALEXANDER.

Subscribed and sworn to before me this twenty-fifth day of March, 1911.

[Notarial Seal] Z. R. CHENEY,
Notary Public for Alaska.

Due service of the within is admitted this 25 day of Mch., 1911.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: No. 840. In the District Court for Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Answer. Filed Mar. 27, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. Z. R. Cheney, Attorney for Deft. Office, Juneau, Alaska, Lewis Block. [18]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Motion to Strike.

Comes now the above-named plaintiff by his attorneys, Winn & Burton, and moves the Court to strike from the Answer of defendant herein all of the Affirmative Defense of said defendant, for the reason and upon the following grounds, viz.:

I.

Because said Affirmative Defense does not set up any new matter constituting a defense, and any defense appearing therein can only be made by a denial

of the material allegations contained in the complaint of plaintiff filed herein.

WINN & BURTON,
Attorneys for Plaintiff.

Due service of a copy of the within motion is admitted this 27 day of March, 1911.

Z. R. CHENEY,
Attorney for Deft.

[Endorsed]: Original. No. 840–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Motion. Filed Mar. 27, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska, Office No. ——.

[19]

[Order Denying Motion to Strike, etc.]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,
Plaintiff,

vs.

CLAIRE ALEXANDER,
Defendant.

Hearing.

On this day this cause coming on regularly for hearing upon the Order to Show Cause heretofore issued herein, the plaintiff being represented by Newark L. Burton, Esquire, and the defendant being

represented by Z. R. Cheney, Esquire, the following proceedings were had, to wit:

The motion of plaintiff to strike from the answer of defendant herein all of the affirmative defense, after argument had by counsel, and the Court being fully advised in the premises, is denied. Whereupon Plaintiff's Exhibits "A" and "B" are offered and received in evidence.

Whereupon the defendant, Claire Alexander, is sworn and testifies in his own behalf, and Defendant's Exhibit 1 is introduced and admitted in evidence.

Thereupon it is agreed between the parties hereto that the hearing herein be reported and that each party pay one-half of the cost of reporting the same.

Whereupon the following-named witnesses were sworn and testified in behalf of the defendant, to wit: J. W. Kilgore, Captain L. Williams, N. C. Gallagher, W. A. Douglas. Thereupon the defendant is recalled and the defense rests.

Whereupon Captain R. H. Mason is sworn and testifies on behalf of plaintiff, and the further hearing of this cause is continued until to-morrow morning at ten o'clock.

Dated Monday, March 27, 1911.

(Civil Journal, p. 47.)

THOMAS R. LYONS,
Judge. [20]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

C. J. ALEXANDER,

Defendant.

Order [Dissolving Preliminary Restraining Order, etc.]

This matter came regularly on for hearing upon affidavits and oral testimony submitted by the respective parties, and now the Court being fully advised in the premises, and after hearing argument by counsel,

IT IS ORDERED that the preliminary restraining order heretofore made on March 22, 1911, be, and the same is hereby, dissolved; to all of which plaintiff excepts, and exception is allowed.

IT IS FURTHER ORDERED that the order heretofore made on March 28, 1911, restraining plaintiff from erecting any structures in front of his Nonmineral Survey No. 804, or otherwise interfering with the fish-trap of defendant, be and the same is hereby dissolved.

Done in open court this 30th day of March, 1911.

THOMAS R. LYONS,
Judge of the District Court.

[Endorsed]: No. 840–A. In the District Court of the United States for the Div. No. 1 of Dist.

Alaska. James T. Barron vs. C. J. Alexander. Order. Filed Mar. 30, 1911. H. Shattuck, Clerk. By C. Z. Denny, Asst. [21]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Reply.

Comes now the above-named plaintiff by his attorneys, Winn & Burton, and replying to the Affirmative Defense set forth in the Answer of the defendant herein, denies and states as follows:

I.

Replying to paragraph A of said Affirmative Defense in the Answer of the defendant herein, plaintiff has not sufficient knowledge or information upon which to base a belief, and therefore denies each and every allegation contained in said paragraph.

II.

Replying to paragraph D of said Affirmative Defense set forth in said Answer of defendant herein, plaintiff denies each and every allegation in said paragraph contained.

III.

Replying to paragraph E of said Affirmative Defense set forth in said Answer of defendant herein,

plaintiff denies that the acts of the defendant do not interfere with, damage or affect the plaintiff in any manner; denies that the defendant's said fish-trap in no manner obstructs plaintiff's right of access to navigable water, nor his right of ingress or egress over the shore or tide land in front of the upland which he claims and which is called Nonmineral Survey No. 804; that on the contrary this plaintiff alleges as in his complaint herein, that said fish-trap [22] does interfere with, damage and affect the plaintiff and obstructs plaintiff's right of access to navigable water of Chatham Strait,and his right of ingress and egress over the shore or tide land in front of his upland embraced within Nonmineral Survey No. 804.

IV.

Replying to paragraph F of said Affirmative Defense set forth in said answer of defendant herein, plaintiff denies that said upland embraced within said U. S. Nonmineral Survey No. 804 was at the time defendant drove his said trap and is now wholly unoccupied, but alleges as set forth in his complaint herein, that said land was surveyed by plaintiff under Soldiers' Additional Scrip Act and plaintiff has in his possession the necessary scrip to purchase said land under said Act. Denies that said land embraced within said survey No. 804 is of no value whatever for any purpose, and alleges that such land at the time the same was taken up by the plaintiff herein was open, unoccupied, unappropriated public domain subject to location and entry under the laws of the United States applicable to public lands in the

District of Alaska, and subject to entry under the Soldiers' Additional Scrip Act.

WHEREFORE, plaintiff prays for the relief prayed for in his Complaint filed herein.

WINN & BURTON,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

I, James T. Barron, being first duly sworn, on oath say: That I am the plaintiff in the above-entitled action; that I have read the foregoing Reply and know the contents thereof and believe the same to be true.

JAMES T. BARRON. [23]

Subscribed and sworn to before me this nineteenth day of July, A. D. 1911.

[Notarial Seal] NEWARK L. BURTON,
Notary Public for Alaska.

[Endorsed]: Original. No. 840–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Reply. Filed Jul. 30, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ————. Office: Juneau, Alaska, Office No. ———. [24]

In the United States District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Amended and Supplemental Complaint.

To the Honorable THOS. R. LYONS, Judge of the above-entitled court:

Comes now the above-named plaintiff, by his attorneys, Winn & Burton, and consent of the Court first had and obtained, files this his Amended and Supplemental Complaint, and complaining of the above-named defendant, for cause of action alleges:

I.

That on, to wit, prior to June, 1909, one V. A. Robertson located and had surveyed under the Soldiers' Additional Homestead Laws, applicable to Alaska and pertaining to the acquisition of title to Government land in the District of Alaska, that certain piece or parcel of land, lying and being on the south shore of Chatham Straits, a navigable arm of the north Pacific Ocean, about five (5) miles north of Hawk Inlet in the District of Alaska, and more particularly described as follows, to wit:

Situate on Chatham Strait about two miles south of Funter Bay, Alaska:

Beginning at Cor. No. 1 M. C., from whence U.

S. L. M. No. 804 bears S. 74° 02′ W. 5.78 chains; thence meandering shore line of Chatham Strait, 1st course, S. 80° 51′ E. 6.15 chains; 2nd course, N. 86° 05′ E. 5.89 chains to Cor. No. 2; thence North 4.36 chains to Cor. No. 3; thence West 11.95 chains to Cor. No. 4; thence S. 3.78 chains to Cor. No. 1 M. C., place of beginning. Area embraced within said survey, 5.27 acres. [25]

II.

That at the time of the location and survey of said piece or parcel of land by the said Robertson, the same and each and every portion thereof was United States Government land unoccupied and unappropriated and open to entry under the Soldiers' Additional Homestead Laws, applicable to said District of Alaska. That on the 16th day of June, 1909, the official plat and field-notes of said land and survey thereof were approved by the Surveyor-General of the District of Alaska, and said plat and field-notes so approved, as aforesaid, were, as in such cases made and provided, forwarded by the Surveyor-General to the local U. S. Land Office at Juneau, Alaska, and is designated and known as U. S. Nonmineral Soldiers' Addition Survey, No. 804. That on or about the first day of March, A. D. 1911, for value received, the said V. A. Robertson conveyed by good and sufficient deed in writing the above described tract or parcel of land embraced within said U. S. Nonmineral Survey No. 804, aforesaid, to James T. Barron, the plaintiff herein, and said James T. Barron is now, and at all times mentioned herein has been, since said conveyance, the owner of the land embraced in said Survey No. 804.

III.

That since the purchase of said piece or parcel of land by this plaintiff, as aforesaid, said plaintiff has caused such proceedings to be had in the United States Land Office, aforesaid, that entry and final proof was made and submitted to said Land Office for United States patent to said lands embraced in said survey, and since the commencement of this action, final Receiver's Certificate has been issued by said U. S. Land Office to said plaintiff for said land embraced in said survey, and patent will soon be issued therefor. [26]

IV.

That this plaintiff now is, and at all times mentioned herein has been, the President of and largely interested in a corporation known as Thlinket Packing Company, owning and operating a large salmon cannery at Funter Bay, Alaska, a distance of about four (4) miles from the land embraced in said U. S. Survey No. 804; that said salmon cannery has a capacity to enable the packing of about three thousand (3,000) cases of salmon per day at the present time, and has been built up from time to time to its present size and capacity; that Chatham Strait, the arm of the Pacific Ocean upon which said land embraced in said Survey No. 804, contains navigable waters for all sizes of vessels, and that at all parts of said Strait, the ocean tides regularly ebb and flow and that the waters of said Chatham Strait abound in fish and especially salmon, and particularly is that part of the water of said Strait, immediately in front and upon which said land in said survey abuts, abundant with salmon, and said land is particularly

valuable for a fishing site when the way to it over the waters of said Chatham Strait is unobstructed, and ingress and egress to and from said land to deep water of said Chatham Strait is unobstructed in any manner; and said land embraced in said U. S. Survey No. 804, that on account of the winds and tides, and elements, it is necessary to have absolutely the water in front of said land left entirely unobstructed so that ingress and egress to and from said land can be had by either small or large steamers or water crafts. That it has at all times been the intention of this plaintiff to use said land embraced in said survey and the right of way out to deep water the entire width of said land as a fishing site and station, all of which is necessary to [27] have and hold in order for plaintiff to successfully carry on the cannery business in which he is engaged in connection with said Thlinket Packing Company, and that said plaintiff and said company have expended over Four Hundred Thousand ($400,000) Dollars in the enterprise of fishing and canning salmon as aforesaid.

V.

That on or about the 14th day of March, 1911, the above-named defendant, his agents, servants and employees, entered upon the above-described Survey No. 804 and upon the said navigable waters directly in front of said described land without the knowledge or consent of this plaintiff and commenced to drive piles upon the tide land and waters immediately in front of and abutting upon the piece or parcel of land embraced in said Survey No. 804 at a

point indicated upon the blue-print and map hereto attached, indicated by the words "piles driven by Alexander on March 28th, 1911," which said blue-print or map is hereby referred to and hereto attached and made a part of this complaint. That about at this last mentioned date, said facts became known to this plaintiff and plaintiff forbade said defendant and his agents and employees from driving said piles and obstructing plaintiff's right of way out to deep water from his said uplands, but notwithstanding said fact, said defendant continued driving piles in the manner aforesaid and plaintiff immediately commenced this action and applied to this Court for a restraining order, and a temporary restraining order was granted herein but which was afterwards dissolved by this Court, but before said defendant had completed the driving of his piles for the completion of his fish-trap; that after the dissolution of said temporary restraining order, the said defendant continued the driving of piles for the completion of his said trap and the [28] lead thereto, as is indicated upon the map and blue-print hereto attached, which said lead to said trap is indicated on said blue-print by the following words, or along the line of the following words, "Showing line of lead at intersection with shore line," and did afterwards complete his said trap with pot, filler, heart and lead substantially as indicated upon said blue-print or map hereto attached, and did extend the lead of said trap from said pot, filler and heart, which are indicated on said blue-print by the words "Piles driven by Alexander," to the uplands of this plaintiff embraced in said U. S. Survey No. 804, all of which

was against the will and consent of this plaintiff and in direct violation of what defendant had testified to in this court in order to obtain a dissolution of the temporary restraining order hereinbefore referred to, and was knowingly and maliciously and wrongfully done by said defendant with full knowledge of plaintiff's rights, and knowing full well that it would entirely and completely cut off and obstruct plaintiff's right of way from his upland out to deep water and navigable waters of said Chatham Strait, and the same has entirely obstructed, cut off and rendered impossible plaintiff's ingress and egress to and from his land to deep and navigable waters of said Chatham Strait with gasoline boats, small steamers, and in fact any and all water crafts of any and all sizes except perhaps row boats, which has caused and is causing this plaintiff great irreparable damages, and this plaintiff has no speedy and adequate remedy at law.

VI.

That the temporary restraining order originally granted herein by this Honorable Court in favor of plaintiff and against the defendant was dissolved on motion of said defendant, and said dissolution was contested by this plaintiff for the reasons [29] herein stated, and for the reason that plaintiff at said time believed that defendant was going to complete his trap in such a manner as to obstruct plaintiff's access to deep and navigable waters from his upland, and in fact, cut off access thereto entirely, and by reason of the facts herein referred to and stated, an emergency exists for the granting of a per-

emptory and mandatory injunction.

WHEREFORE, plaintiff prays judgment as follows: That a peremptory and mandatory injunction be granted herein by this Honorable Court, ordering and directing, and commanding the said defendant to remove the obstruction and obstructions herein complained of, cutting off plaintiff's right of way to deep and navigable waters of Chatham Strait from his uplands contained in said U. S. Survey No. 804, or, that plaintiff be permitted to remove the same and each and every portion of said obstruction,

And second: That said defendant, his agents, representatives, employees and any and all persons holding by, thru or under him, and each and all of them, be forever restrained from interfering with plaintiff's right of possession or use of the tide lands and grounds immediately in front of his upland, and defendant also be restrained from in any wise interfering with plaintiff's right of way to and from his upland to deep and navigable waters of Chatham Strait; and for such other and further relief as to this Court may seem just and equitable, and for plaintiff's costs and disbursements herein.

WINN & BURTON,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

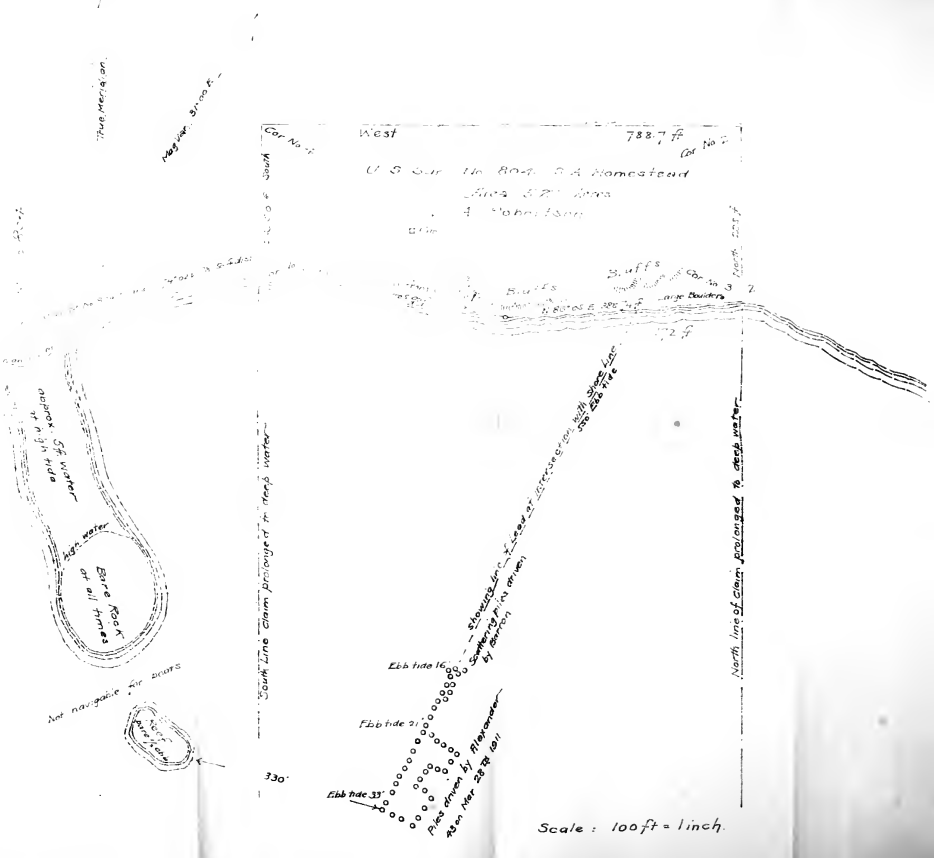
I, James T. Barron, being first duly sworn, on oath, say: That I am the plaintiff in the above-entitled action; that I have [30] read the foregoing Amended and Supl. Complaint and know the contents thereof, and believe the same to be true.

JAMES T. BARRON.

Subscribed and sworn to before me this 18th day of March, A. D. 1912.

JNO. R. WINN,
Notary Public for Alaska.

[Endorsed]: Filed Mar. 11, 1912. E. W. Pettit, Clerk. [32]


True Meridian
Magnetic Variation
Cor No 1
West
788.7 ft
Cor No 2
U S Sur No 80 of S A Homestead
Land 37 Acres
4 Subdivisions
South
North 225 ft
Bluffs
Cor No 3
Large Boulders
Bluffs
Bears S 39° E
72 ft
South Line Chain prolonged to deep water
Approx 5 ft water at high tide
High water
Bare Rock at all times
Not navigable for boats
Reef partly bare
330'
Ebb tide 16'
Ebb tide 21'
Ebb tide 33'
Piles driven by Alexander
Aden Mar 28th 1911
Stones from N end of breakwater with Steel Line
Scattering Piles driven by Barron
330 Feet
North line of Claim prolonged to deep water
Scale : 100ft = 1inch.
Chatham Strait

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Answer [to Amended and Supplemental Complaint].

Comes now the defendant in the above-entitled case, and for answer to the amended and supplemental complaint on file herein:

I.

Denies each and every allegation contained in paragraphs Nos. I, II, III, IV and V, of the amended and supplemental complaint, except the following allegation appearing in said paragraph IV, viz.: "That Chatham Straits contains navigable waters for all sizes of vessels, and that at all parts of Chatham Straits the ocean tides regularly ebbs and flows, and that the waters of said Chatham Straits abound in fish and especially salmon."

II.

Denies each and every allegation contained in paragraph VI of said complaint, except the following: "That the temporary order, originally granted herein by this Honorable Court in favor of the plaintiff and against the defendant, was dissolved on motion of said defendant and said disallusion was contested by this plaintiff." [33]

And as an affirmative defense to the matters and things charged in said complaint, defendant alleges:

A.

That he is a citizen of the United States, over twenty-one years of age and a resident and inhabitant of the territory of Alaska; that defendant has for many years been engaged in the business of salmon fishing in the waters of Southeastern Alaska; that he and his associates are now engaged in such business and have invested large sums of money in steamboats, fish-traps and other property and appliances used in their said business.

B.

That Chatham Strait is a large arm of the Pacific Ocean, navigable for all sizes of vessels, and is about two hundred miles in length, and has an average width of about fifteen miles; that at the place where defendant has constructed his fish-trap hereinafter described said Chatham Strait is about twelve miles in width; that in all parts of said Strait the ocean tides regularly ebb and flow; that the waters of said Chatham Strait abound in fish, salmon being especially abundant, and said waters constitute a fishery, free, public and common to all persons.

C.

That on or about the 1st day of November, 1910, defendant and others who are interested in business with him located a place in said Chatham Strait about two miles south of Funter Bay on the shores of Admiralty Island, and in the open navigable waters of said Strait, for the purpose of constructing a fish-trap for taking salmon; that said place so located by

defendant, is a valuable fish-trap site [34] for the reason that large schools of salmon abound in the immediate waters; that the place so selected and located by defendant as aforesaid was unoccupied and unappropriated and was not being used by anyone engaged in the fish business or in any other kind of business except commerce and navigation; that it was open, navigable water; that after so locating said place, as aforesaid, defendant and his associates made soundings, and thereafter at great expense procured piles and a pile-driver and steamboat, all of which defendant used in the construction and erection of a fish-trap upon the location above mentioned; that defendant drove said piles and constructed said trap entirely in the open, unoccupied, unappropriated, navigable waters of said Chatham Strait below low-tide lands of Admiralty Island; that the place where said trap was so constructed and driven by defendant is, as defendant is now informed, directly in front of land claimed by the plaintiff and called Nonmineral Survey No. 804.

D.

Defendant further alleges that neither in the building and construction of his fish-trap at the place above described, nor in the operation of the same, has he attempted to interfere with the plaintiff or anyone else; that he has not threatened to interfere nor attempted to interfere, and does not now intend to interfere with plaintiff in the use of his land or property, nor his rights to fish in the navigable waters of Chatham Straits; that defendant, in the location of said trap-site and in the lawful pursuit of his right

to fish in the navigable waters of the ocean where his said trap is constructed, has expended more than Four Thousand ($4,000) Dollars, and the [35] value of said trap, including the profits which defendant expects to make during the season of 1911, is more than Ten Thousand ($10,000) Dollars.

E.

That plaintiff is not engaged in fishing with traps or any other devices or appliances in or near the said place where defendant has constructed his said trap, and the acts of the defendant do not interfere with, damage or affect the plaintiff in any manner; that the defendant's said fish-trap in no manner obstructs plaintiff's right of access to navigable water, nor his right of ingress or egress over the shore or tide land in front of the upland which he claims and which is called Nonmineral Survey No. 804.

F.

Defendant further alleges that the land covered by Survey No. 804 and claimed by plaintiff was at the time defendant drove his said trap and is now wholly unoccupied, unimproved and uncultivated; that there are no canneries or cannery buildings or wharves of any kind located on said land, and no buildings or improvements of any kind or description located on said land, except one small unoccupied board shack, costing not to exceed Fifteen ($15) Dollars; that said land is covered with a dense growth of forest; that said land so claimed by plaintiff is of no value whatever for agricultural purposes or any other purpose.

WHEREFORE, having fully answered, defendant prays that the temporary restraining order here-

tofore made be dissolved and that defendant be dismissed with his reasonable costs.

Z. R. CHENEY,
R. W. JENNINGS,
Attys. for Defdt. [36]

United States of America,
District of Alaska,—ss.

I, C. J. Alexander, being first duly sworn, on oath say: That I am the defendant in the above-entitled action; that I have read the foregoing Answer and know the contents thereof, and believe the same to be true; that I make this verification because.....

C. J. ALEXANDER.

Subscribed and sworn before me this 14th day of Mch., 1912.

[Seal] Z. R. CHENEY,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 14th day of Mch., 1912.

WINN & BURTON,
Attorney for Plaintiff.

[Endorsed]: No. ——. In the District Court for Alaska, Division No. 1, at Juneau. J. T. Barron, Plaintiff, vs. C. J. Alexander, Defendant. Z. R. Cheney, Attorney for ————. Office: Juneau, Alaska, Lewis Block. Filed Mar. 15, 1912. E. W. Pettit, Clerk. [37]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE ALEXANDER,

Defendant.

Reply to Answer to Amended and Supplemental Complaint.

Comes now the above-named plaintiff and replying to the Answer to the Amended and Supplemental Complaint herein states and alleges as follows:

I.

Referring to paragraph A of the Affirmative Defense in said Answer, this plaintiff has not knowledge or information sufficient to form a belief as to the facts set forth therein and therefore denies the same and each and every part thereof.

II.

Referring to paragraph B of said Affirmative Defense in said Answer, this plaintiff denies that portion thereof in the last two lines of said paragraph which reads as follows: "said waters constitute a fishery free, public and common to all persons."

III.

Replying to paragraph C of said Affirmative Defense in said Answer, this plaintiff denies the same and each and every portion thereof, except that the site in question is a valuable fish-trap site and that large schools of salmon abound in the immediate

waters, and that the defendant has erected a fish-trap and that said trap so constructed is in front of the land owned by said plaintiff embraced in Nonmineral Survey No. 804. And further replying to said paragraph, this plaintiff states that said fish-trap of said defendant is driven entirely [38] within the harbor immediately in front of plaintiff's land and connected to the shore and said upland, and in the manner as set forth in the Amended and Supplemental Complaint herein, and prevents plaintiff's ingress and egress to and from his said upland out of said harbor, and that said water in said harbor or cove is a part of the waters of Chatham Strait.

IV.

Referring to paragraph D of said affirmative defense in said Answer and replying thereto, this plaintiff states that he denies said paragraph and each and every portion thereof, except that defendant has constructed a fish-trap in the manner and form hereinbefore described in this Reply and in the Amended and Supplemental Complaint herein.

V.

Referring to paragraph E of said Answer, this plaintiff denies the same and each and every portion thereof.

VI.

Referring to paragraph F of said Answer, this plaintiff denies the same and each and every portion thereof, except the plaintiff admits that he has no cannery on said premises included in said Survey 804; admits that he has a building thereon. And further replying to said paragraph this plaintiff al-

leges the reason that he has not used said premises for a wharf, fish station, fish site or fish-trap site, is, that he has been prevented from so doing by the wrongful acts of the defendant as set forth in the complaint herein.

WHEREFORE, plaintiff prays for the relief demanded in the Amended and Supplemental Complaint herein.

WINN & BURTON,
Attorneys for Plaintiff. [39]

United States of America,
District of Alaska,—ss.

I, James T. Barron, being first duly sworn, on oath, say: That I am the plaintiff in the above-entitled action; that I have read the foregoing Reply and know the contents thereof, and believe the same to be true.

JAMES T. BARRON.

Subscribed and sworn to before me this fifteenth day of March, A. D. 1912.

[Seal] NEWARK L. BURTON,
Notary Public for Alaska.

Due service of a copy of the within Reply admitted this 15th day of Mch., 1912.

Z. R. CHENEY,
R. W. JENNINGS,
Attorney for Defdt.

[Endorsed]: Copy. No. 840–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire Alexander, Defendant. Reply to Answer to Amended and Supplemental Complaint. John R. Winn, Newark

L. Burton, Attorneys for ————. Office: Juneau, Alaska, Office No. ———. Filed Mar. 18, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [40]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Order [Denying Motion for a New Trial, etc.].

The motion for a new trial herein and to set aside the opinion filed by the Court in this cause and grant a rehearing herein, coming on for hearing on this 1st day of July, A. D. 1912, and before the Court had made, rendered, signed and filed its Findings of Fact and Conclusions of Law herein, and the Court being fully advised in the premises, overrules and denies said Motion, and to said action of the Court the above plaintiff excepts and said exception is by the Court allowed.

Done in open court this 1st day of July, A. D. 1912.

THOMAS R. LYONS,

Judge.

Entered Court Journal No. 1, page 311.

Filed Jul. 1, 1912. E. W. Pettit, Clerk. By ————, Deputy. [41]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Order [Denying Findings, etc.].

This matter coming on for hearing on the Findings of Fact and Conclusions of Law, offered and tendered herein by plaintiff and defendant, respectively, and the Court being fully advised herein, overrules and denies the Findings of Fact except wherein the same are in conformity with the findings made by the Court and Conclusions of Law, and each of them, tendered and offered by plaintiff and makes its own Findings herein, and to which said overruling and denying of plaintiffs tendered Findings No. 1, No. 2, No. 3, No. 4, plaintiff asks and is allowed an exception, but the Court does find that plaintiff is the owner of the upland set forth and described in the plaintiff's complaint, to which Findings said plaintiff does not ask an exception; and to the refusal of the Court to make Findings V, VI, VII and VIII offered and tendered by plaintiff, plaintiff asks and is allowed an exception.

And to the refusal of the Court to make and sign Conclusions of Law, I, II, III, offered and tendered

by plaintiff, plaintiff asks and is allowed an exception.

And to the making, signing and filing herein by the Court its Findings II and III, and its Conclusions of Law I and II, this plaintiff asks and is allowed an exception.

Done in open court this 1st day of July, A. D. 1912.

THOMAS R. LYONS,
Judge.

Entered Court Journal No. 1, pages 313–14.

Filed Jul. 2, 1912. E. W. Pettit, Clerk. By ————, Deputy. Nunc pro tunc as of July 1, 1912. [42]

In the District Court of Alaska, Division No. One.

No. 840–A.

JAMES T. BARRON,
Plaintiff,

vs.

CLAIRE ALEXANDER,
Defendant.

Findings and Conclusions and Decree Requested by Defendant.

This cause came on for trial March 18, 1912, before the Judge of the above-entitled court, on the pleadings and on the evidence produced. The parties were represented by their respective counsel, to wit, Messrs. Winn and Burton, for plaintiff, and Mr. Z. R. Cheney and Mr. R. W. Jennings, for defendant, and were present in person. Both sides announced themselves ready for trial. Evidence was heard and

argument had on behalf of both sides; and at the instigation and request of both sides the Court made a trip to the *locus in quo* and personally inspected the fish-trap complained of and the upland mentioned in the complaint. On the 4th day of May, 1912, the Court rendered its opinion herein in favor of defendant. And defendant now moving for Findings, Conclusions and Decree, in accordance therewith, the Court, from all the evidence herein, doth make the following

FINDINGS OF FACT.

(1) That the tide lands in front of U. S. Survey No. 804, mentioned in the complaint herein, are not, and never have been, in the possession or occupancy of plaintiff, or his grantors.

(2) That the fish-trap of defendant, nor any acts of defendant, have not obstructed or interfered with, and will not obstruct or interfere with, the free ingress to or egress from the land covered by said Survey No. 804.

And, from the facts so found, the Court makes the following

CONCLUSIONS OF LAW.

(1) That the plaintiff is not entitled to the injunction [43] sought or to any other relief.

(2) That the complaint herein should be dismissed with costs.

Wherefore it is ordered, adjudged and decreed that the complaint herein be and the same is hereby dismissed, and that defendant do have and recover of

and from plaintiff his costs and disbursements herein, to be taxed.

In open court this —— day of ————, 1912.

————————,
Judge.

[Endorsed]: No. 840–A. James T. Barron vs. Claire Alexander. Findings, Conclusion and Decree Requested by Defendant. Filed Jun. 28, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [44]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Findings of Fact and Conclusions of Law.

The Court having heretofore on the 4th day of May, 1912, rendered and filed its written Opinion in this cause, now makes the following Findings of Fact and Conclusions of Law herein:

FINDINGS OF FACT.

I.

That the plaintiff is the owner and entitled to the possession of the following described tract or parcel of land situate, lying and being on the south shore of Chatham Straits, about five miles north of Hawk Inlet, on Admiralty Island, in the District of Alaska,

more particularly described as follows, to wit:

Beginning at corner No. 1 M. C., from whence U. S. L. M. No. 804 bears S. 74° 2′ West 5.78 chains; thence meandering the shore line of Chatham Straits, first course S. 80° 51′ East 6.15 chains; second course North 86° 5′ East 5.89 chains to corner No. 2; thence North 4.36 chains to corner No. 3; thence West 11.95 chains to corner No. 4; thence South 3.78 chains to corner No. 1 M. C., place of beginning, containing an area of 5.27 acres;

II.

That said tract of land abuts on Chatham Straits, an arm of the North Pacific Ocean; that in the spring of 1911 the defendant commenced the construction of a fish-trap in the waters of Chatham Straits opposite and in front of the tract of land hereinbefore described; that subsequently and before the trial [45] of this action the defendant completed the construction of said fish-trap; that said fish-trap and the whole thereof, including the lead line, are situate in the waters of Chatham Straits and below low-water mark.

III.

That defendant's fish-trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said deep water of said Chatham Straits; that the operation of said fish-trap will not obstruct or interfere with the free ingress to or egress from the land hereinbefore described; and that none of

the acts of the defendant with reference to the construction, maintenance or operation of said fish-trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits.

From the fact so found, the Court makes the following:

CONCLUSIONS OF LAW.

I.

That the plaintiff is not entitled to the injunction sought herein or to any other relief.

II.

That the plaintiff's complaint herein should be dismissed and defendant should have judgment for his costs and disbursements herein.

Done in open court this first day of July, 1912.

THOMAS R. LYONS,
Judge.

Entered Court Journal No. 1, pages 310, 311. [46]

[Endorsed]: No. 840–A. In the District Court of the United States for the Div. No. 1, of Alaska. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Findings of Fact and Conclusions of Law. Filed July 1, 1912. E. W. Pettit, Clerk. [47]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Order [Denying Motion for a New Trial, etc.].

The motion for new trial herein, or the setting aside of the Findings of Fact and Conclusions of Law made and filed by the Court in this cause, and the granting of a rehearing herein, coming on for hearing on motion of plaintiff, and the same being supported by the affidavit of Jno. R. Winn herein concerning the visit of the Judge of this court to the situs of the fish-trap and the tract of land described in plaintiff's complaint and the change made in the construction of said fish-trap, and the Court being fully advised in the premises, overrules and denies said motion and further states that the change made in the construction of the fish-trap by the said defendant does not cause the same to in any wise interfere with plaintiff's free ingress from the navigable waters of Chatham Straits to his upland and all parts thereof, or free egress from his upland and all parts thereof to the navigable waters of said Chatham Straits. To

all of which the plaintiff asks and is allowed an exception.

Done in open court this 2d day of July, A. D. 1912.

THOMAS R. LYONS,
Judge.

Entered Court Journal No. 1, page 314.

[Endorsed]: Filed Jul. 2, 1912. E. W. Pettit, Clerk. By ————, Deputy. [48]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 840–A.

JAMES T. BARRON,
Plaintiff,

vs.

CLAIRE J. ALEXANDER,
Defendant.

Decree.

Now, on this day, this matter coming on to be heard and the Court heretofore having made and entered its Findings of Fact and Conclusions of Law herein, and the plaintiff having filed a motion for a new trial herein, and the Court having considered said motion and having duly and regularly overruled the same,—

IT IS NOW, THEREFORE, CONSIDERED, ORDERED, ADJUDGED and DECREED, that the complaint herein be, and the same is hereby, dismissed, and that the defendant do have and recover of and from the plaintiff his costs and disbursements herein to be taxed in the sum of $169 50/100 Dollars.

To all of which the plaintiff excepts and such exception is allowed by the Court.

Done in open court this second day of July, 1912.

THOMAS R. LYONS,
Judge.

Entered Court Journal No. 1, page 314.

[Endorsed]: No. 840–A. In the District Court of the United States for the Div. No. 1, of Alaska. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Decree. Filed Jul. 2, 1912. E. W. Pettit, Clerk. By ————, Deputy. [49]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,
Plaintiff,

vs.

CLAIRE J. ALEXANDER,
Defendant.

Motion [to Make Certain Exhibits Part of Bill of Exceptions].

Comes now the above-named plaintiff by his attorneys, Winn & Burton, and moves the Court to make the following exhibits part of the Bill of Exceptions in the above-entitled cause, viz.:

Photographs: Defendant's Exhibits 5, 6, 7, 8, 9, 10, 11 and 12;

Plat: Defendant's Exhibits No. 3 and No. 4;

Telegrams: Defendant's Exhibits Nos. 1 and 2;

ALSO

Plats: Plaintiff's Exhibits "B," "C," "A," "D";
Application Form of Soldiers' Additional Homestead;
Assignment of Scrip to Barron;
Telegrams: Plaintiff's Exhibits "E" and "D."

Also moves the Court to permit the original exhibits as follows to be attached to the Bill of Exceptions and made a part thereof, viz.:

Defendant's Exhibits 5, 6, 7, 8, 9, 10, 11, and 12, being photographs above named; and Defendant's Exhibit No. 3, being plat above named;

Also Plaintiff's Exhibits "A" and "C," being plats;

Also moves the Court to make the Findings of Fact and Conclusions of Law, and motion to set aside the opinion of the Court and for a rehearing, and the motion to set aside [50] the Findings of Fact and Conclusions of Law and for new trial herein or rehearing; also the affidavit of Jno. R. Winn in support of the motion for a new trial, or the setting aside of the Findings of Fact and Conclusions of Law and granting a rehearing herein, and the affidavit of Jno. R. Winn as to the value of subject matter of litigation, all be made a part of the record or Bill of Exceptions on appeal herein.

WINN & BURTON,
Attorneys for Plaintiff.

Filed Jul. 2, 1912. E. W. Pettit, Clerk. By ————, Deputy. [51]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Order [Making Certain Exhibits Part of Bill of Exceptions].

The motion of plaintiff herein to make certain exhibits, offered in evidence upon the trial of the above-entitled cause, part of the record for appeal herein, and the request of plaintiff to have certain original exhibits, offered in evidence in said cause, forwarded with the record on appeal to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, and the Court being fully advised in the premises,

IT IS ORDERED, that the following exhibits be made a part of the record herein for appeal, to wit:

Photographs: Defendant's Exhibits 5, 6, 7, 8, 9, 10, 11 and 12;

Plats: Defendant's Exhibits No. 3 and No. 4;

Telegrams: Defendant's Exhibits Nos. 1 and 2;

ALSO

Plats: Plaintiff's Exhibits "A," "B," "C," and "D";

Application Form of Soldiers' Additional Homestead;

Assignment of Scrip to Barron;

Telegrams: Plaintiff's Exhibits "E" and "D."

Also the following are made a part of record on appeal herein:

Findings of Fact and Conclusions of Law offered and tendered by the plaintiff herein;

Motion to set aside the opinion of the Court and grant [52] a new trial or rehearing herein;

Motion to set aside the Findings of Fact and Conclusions of Law made by the Court and to grant a new trial or rehearing herein;

Affidavit of John R. Winn in support of the motion to set aside the Findings of Fact and Conclusions of Law made by the Court herein and the granting of a new trial or rehearing;

Affidavit of John R. Winn showing that the value of subject matter of litigation in this cause exceeds in value $500.00, and the opinion of the Court rendered and filed herein.

Done in open court this 2d day of July, A. D. 1912.

THOMAS R. LYONS,
Judge.

Entered Court Journal No. 1, page 315.

Filed Jul. 2, 1912. E. W. Pettit, Clerk. By ————, Deputy. [53]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,
Plaintiff,

vs.

CLAIRE J. ALEXANDER,
Defendant.

Notice [of Settlement of Bill of Exceptions, etc.].

To the Above-named Defendant, Claire J. Alexander, and Z. R. Cheney and Robert W. Jennings, His Attorneys:

Please take notice that we will call up for hearing, settling and allowing the Bill of Exceptions of the above-named plaintiff on appeal to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, from the judgment rendered in the above-entitled court against the above-named plaintiff, James T. Barron, and all other matters pertaining to the perfection, settling and allowing an appeal from said judgment or decree, before Honorable Thomas R. Lyons, Judge of the above-entitled court, on the 1st day of July, 1912, at ten o'clock in the forenoon of said day, at the courthouse in Juneau, Alaska.

Dated this 27th day of June, A. D. 1912.

WINN & BURTON,
Attorneys for Plaintiff. [54]

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within notice on the 27th day of June, 1912, at Juneau, Alaska, and that I served the same on the 27th day of June, 1912, at Juneau, Alaska, by leaving a true copy of the within notice at the residence of the within-named attorney for the defendant, R. W. Jennings, at the hour of 1 P. M., the said copy having been delivered to the wife of the said R. W. Jennings, she being a person of

suitable age and discretion; and it is further certified that the said R. W. Jennings was absent from his place of residence and office and that access to the latter could not be obtained.

H. L. FAULKNER,
United States Marshal.
By J. F. Mullen,
Chief Deputy.

Dated at Juneau, Alaska, this 27th day of June, 1912.

[Endorsed]: Received at Juneau, Alaska, June 27, 1912, at 10:45 A. M. Docket No. 2308. H. L. Faulkner, U. S. Marshal. By J. F Mullen, Chf. Office Deputy. Filed Jul. 1, 1912. E. W. Pettit, Clerk. By ————, Deputy. [55]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Assignment of Errors.

Comes now the above-named plaintiff, James T. Barron, by his attorneys, Winn & Burton, and assigns the following errors committed by the Court on the trial and determination of the above-entitled cause and upon the rendition of a judgment or decree

herein dismissing said action, and upon which plaintiff relies in the Appellate Court, to wit:

I.

The Court erred in making an order herein on March 30th, 1911, dissolving the temporary restraining order which had heretofore been sued out and obtained in this court and cause.

II.

The Court erred in not making, signing and filing herein Findings of Fact, I, offered and tendered by the plaintiff, which said finding covered substantially the fact that the plaintiff was for several years prior to the commencement of this action, and was at the time of the commencement thereof, the president of the Thlinket Packing Company, and was largely interested in said company, and which said company was the owner of a large number of floating stock, fish-boats, etc., and fish-trap sites and fishing [56] stations, which were all necessary for the conducting of its said business.

III.

The Court also erred in not making, signing and filing herein, Finding of Fact II, offered and tendered by plaintiff, which said finding established the fact that the plaintiff herein purchased the trap-site in controversy from the Alaska Packers Association, a corporation, a long time prior to the defendant claiming any interest therein.

IV.

The Court erred in not making Finding of Fact III, offered and tendered by the plaintiff herein, which said finding establishes the fact of the taking

up by one V. A. Robertson, his Soldiers' Additional Homestead claim, which abutted upon the fish-trap site location in controversy, and which said taking up was made a long time prior to defendant claiming any interest in the waters or shore land immediately in front of said homestead claim, which is designated as U. S. Nonmineral Survey No. 804, containing 5.27 acres.

V.

The Court erred in not making Finding of Fact IV, offered and tendered by the plaintiff herein, which recites the fact of the purchase by the plaintiff from the above-mentioned V. A. Robertson, of the upland contained in his said Soldiers' Additional Homestead claim known as U. S. Nonmineral Survey No. 804, which said purchase was made by said plaintiff before the defendant ever claimed any right, title or interest in and to the shore lands bordering thereon or the waterfront of said upland, and that plaintiff continued patent proceedings for said Survey No. 804 which had theretofore been commenced by said Robertson; and that plaintiff obtained [57] a final receiver's certificate therefor before the trial of this cause.

That all of said Findings, I, II, III and IV, so offered and tendered by plaintiff were supported by all the evidence in said cause.

VI.

The Court erred in refusing to make Finding V, offered and tendered by the plaintiff herein, which said finding recites the fact that plaintiff, by reason of owning the upland contained in Survey No. 804,

is entitled to the exclusive right of ingress and egress between his upland and from the shore land, etc., to the navigable waters of Chatham Straits abutting thereon, and is entitled to the exclusive and unobstructed access to said waters from all points of his upland.

VII.

The Court erred in refusing to make Finding of Fact VI, offered and tendered by plaintiff, which in substance shows the use to which plaintiff had devoted the waters and harbor in front of his upland before defendant claimed any rights to said waters, or right to build and maintain a fish-trap therein, and further showing the necessity of plaintiff having the use of said waters for mooring of vessels and reaching of upland abutting thereon; all of which said above mentioned facts were established in part by uncontradicted testimony and evidence, and the remaining portion by a great preponderance of the evidence in said cause.

VIII.

The Court erred in refusing to make Finding VII, offered and tendered by the plaintiff herein, which said finding established the fact of the entry of the plaintiff herein, [58] on March 14, 1911, upon the shore land and water immediately in front of said Survey No. 804, and placing therein and thereupon several piles and a notice that he claimed the said ground and waters as a fish-trap site and station, and the wrongful entry thereon of said premises thereafter by said defendant and doing the acts complained of in said finding so offered and tendered;

also showing the false representations made and testified to by the defendant in order to get the temporary restraining order granted herein dissolved; also showing the manner in which said defendant constructed his fish-trap, and the extending of the lead thereof to the upland of plaintiff; for the reason and upon the ground that all of said facts so contained in said finding were either supported by the uncontradicted testimony and evidence or a great preponderance of the evidence in said cause.

IX.

The Court erred in not making Finding of Fact VIII, offered and tendered by plaintiff herein, wherein said Court was asked to find, among other things, that the construction and maintenance of said fish-trap by defendant had obstructed plaintiff's access to the navigable waters abutting upon his upland, and in fact had, to a great extent, cut off plaintiff's egress from his upland to said navigable waters abutting thereon, and particularly had it done so at the point or place where plaintiff had been accustomed to anchor and moor his vessels, and cut off plaintiff's access to said navigable waters from the part of his shore land best adapted for said purpose and which had been so selected by plaintiff a long time prior to defendant initiating any rights to said shore lands or water immediately in front thereof, for the reason that [59] the said facts set forth in said tendered finding were either supported by the uncontradicted evidence or a great preponderance of the evidence in said cause.

X.

The Court erred in not making Conclusions of Law

I, II and III, offered and tendered by plaintiff, for the reason that said conclusions are supported in some respects by uncontradicted evidence in said cause, and in all respects by a great preponderance of the evidence.

XI.

The Court erred in making, signing and filing all of that portion of the Court's Finding of Fact II herein which reads as follows: "that said fish-trap, and the whole thereof, including the lead line, are situate in the waters of Chatham Straits and below low-water mark," for the reason that said portion of said finding is unsupported by the evidence and largely against the uncontradicted evidence and entirely contrary to a great preponderance of the evidence in said cause.

XII.

That the Court erred in making its Finding of Fact III herein, which is as follows:

> "That defendant's fish-trap does not in any manner interfere with the free ingress and egress to and from the premises hereinbefore described to the deep water of Chatham Straits, nor from any part of said premises to said deep water of said Chatham Straits; that the operation of said fish-trap will not obstruct or interfere with the free ingress to or egress from the land hereinbefore described; and that none of the acts of the defendant with reference to the construction, maintenance or operation of said fish-trap have or will obstruct or interfere with the plaintiff in the exercise of his right to free

and unobstructed access to his land and every part thereof from the deep waters of Chatham Straits or from his land, as hereinbefore described, to the navigable waters of said Chatham Straits." [60]

for the reason that same, in many respects, is against the uncontradicted evidence in said cause, and in all respects against the great preponderance of the evidence and admitted facts in said cause.

XIII.

The Court erred in making Conclusions of Law I and II herein, for the reason said conclusions are against law and are unsupported by the evidence.

XIV.

The Court erred in visiting and inspecting the fish-trap site and waters and shore land in and upon which said fish-trap was constructed, and the upland described in the complaint, after the close of the evidence in said cause, for the reason and upon the ground that said visit was made by the Court, or Judge thereof, upon his own motion and after all the evidence and argument of counsel had been made in the cause, and for the further reason that it appears conclusively from the record in said case that upon the Court's arrival at the property in question, the every thing which he desired to see had been removed, or destroyed, and a new and different fish-trap and lead constructed; and these matters were all taken into consideration by the Court in the making of his Findings of Fact herein, and influenced the Court in the rendition of the final judgment herein, and is tantamount to depriving plaintiff of

his property or property rights without a trial and the rendering of a decision by the Court, not upon the cause of action set forth in the complaint, but the substitution by the Court of a new and entirely different cause of action and rendering a judgment and decree upon the same upon his own judgment and without evidence, and without the plaintiff having his day in court; and the Court should have considered the action of the defendant herein as a confession [61] that the way the fish-trap set up in the complaint was constructed, it obstructed and cut off plaintiff's free ingress to his upland from the navigable waters bordering thereon, and egress from such upland to said waters.

XV.

The Court erred in not granting the motion for a new trial or rehearing herein and setting aside his written opinion filed in this cause.

XVI.

The Court erred in overruling and denying plaintiff's motion herein to set aside the Findings of Fact and Conclusions of Law made and rendered by the Court, and granting a rehearing or new trial in this cause.

WINN & BURTON,
Attys. for Plaintiff.

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within Assignment of Errors on the 3d day of July, 1912, at Juneau, Alaska, and that I served the same on the

3d day of July, 1912, at Juneau, Alaska, by delivering and leaving a full, true and correct copy of said Assignment of Errors to Mrs. R. W. Jennings, she, being there and then the wife of R. W. Jennings, she being there and then over the age of 21 years, and living at the present place of abode of the said R. W. Jennings, the said R. W. Jennings, being, there and then the attorney of the within named defendant Claire J. Alexander, and the said R. W. Jennings being absent from this Division, and said service were made on [62] Mrs. R. W. Jennings, personally and in person.

Dated at Juneau, Alaska, July 3, 1912.

H. L. FAULKNER,
United States Marshal.
By Hector McLean,
Office Deputy.

Marshal's fees: One service, $3.00.
Paid by J. R. Winn.

[Endorsed]: Original. No. 840–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Assignment of Errors. John R. Winn, Newark L. Burton, Attorneys for Plaintiff, Office: Juneau, Alaska, Office: ——. Filed Jul. 3, 1912, E. W. Pettit, Clerk. By H. Malone, Deputy. [63]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Petition for Appeal and Order Allowing Appeal.

To the Hon. THOMAS R. LYONS, District Judge:

The above-named plaintiff, James T. Barron, conceiving himself aggrieved by the judgment and decree made and entered on the 2d day of July, 1912, in the above-entitled cause, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and he prays that this, his appeal, may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made and based, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit, to the end that said decree may be reversed or modified and speedy justice done in the premises.

The said James T. Barron, appellant, does herewith present and file his Assignment of Errors, together with a Bond on Appeal, which said bond appellant prays may be approved by this court and a supersedeas awarded in the premises.

WINN & BURTON,
Attorneys for Plaintiff.

And now, on this 3d day of July, 1912, in open court, it is ordered that the appeal herein be, and the same is, allowed as prayed for above.

THOMAS R. LYONS,

Judge Dist. Ct. of Alaska, Div. No. 1, at Juneau.

Entered Court Journal No. I, page 317.

Filed Jul. 3, 1912. E. W. Pettit, Clerk. By ————, Deputy. [64]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Order Fixing Bond.

The Court having allowed an appeal in the above-entitled cause, it is ordered that the appeal bond be, and the same is, hereby fixed at Five Hundred Dollars ($500.00).

THOMAS R. LYONS,

Judge.

Dated Wednesday, July 3, 1912.

(Civil Journal I, page 317.) [65]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That James T. Barron, as principal, and John Reck and J. C. McBride, of the town of Juneau, Alaska, as sureties, are held and firmly bound unto Claire J. Alexander, the above-named defendant, in the full and just sum of $500.00/100 to be paid to the said Claire J. Alexander, his attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3d day of June, A. D. 1912.

WHEREAS, on the 2d day of July, 1912, in the District Court of the United States for the District of Alaska, Division No. One, in a suit pending in that court, wherein James T. Barron was plaintiff and Claire J. Alexander was defendant, said suit being numbered 840–A, a decree was rendered against the said James T. Barron, the above-named plaintiff, and the said James T. Barron having obtained

an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said Claire J. Alexander, the above-named defendant, citing and admonishing him to be and appear at a [66] session of the United States Circuit Court of Appeals for the Ninth Circuit, on the 3d day of August, A. D. 1912.

Now, the condition of the above obligations is such that if the said James T. Barron shall prosecute his appeal to effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES T. BARRON,
Principal.
By WINN & BURTON,
His Attorneys.
JOHN RECK,
J. C. McBRIDE,
Sureties.

United States of America,
District of Alaska,—ss.

John Reck and J. C. McBride, whose names are subscribed to the foregoing Bond on Appeal, being first duly sworn, each for himself and not one for the other, deposes and says: I am a resident and householder of the District of Alaska, and in all things qualified as bail in said District of Alaska; that I am worth the amount specified in the above bond in separate property over and above all my just debts and

liabilities, exclusive of property exempt from execution, and that I am not an attorney at law, clerk, marshal or other officer of any court.

[Notarial Seal] JOHN RECK.
J. C. McBRIDE.

Subscribed and sworn to before me this 3d day of July, A. D. 1912.

NEWARK L. BURTON,
Notary Public in and for Alaska.

In open court at Juneau, June 3d, 1912—Bond approved.

THOMAS R. LYONS,
Judge. [67]

[Endorsed]: No. 840–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. James T. Barron, Plaintiff, vs. Claire J. Alexander, Defendant. Bond on Appeal. Filed July 3, 1912. E. W. Pettit, Clerk. John R. Winn, Newark L. Burton, Attorneys for ————, Office: Juneau, Alaska. [68]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,
Plaintiff,

vs.

CLAIRE J. ALEXANDER,
Defendant.

Citation on Appeal.

United States of America,—ss.

The President of the United States to Claire J. Alexander, and His Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal filed and of record in the office of the Clerk of the United States District Court in and for the District of Alaska, Division No. One, in a cause wherein James T. Barron is plaintiff and appellant, and Claire J. Alexander is defendant and appellee, to show cause, if any there be, why the judgment and decree rendered against the appellant, James T. Barron, in said cause, as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Hon. EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 3d day of July, 1912, and of the Independence of the United States the 136th.

THOMAS R. LYONS,
Judge.

Copy of above citation received and service accepted this 24 day of July, 1912.

Z. R. CHENEY,
Attorney for Defendant. [69]

Filed Jul. 3, 1912. E. W. Pettit, Clerk. By ————, Deputy. [70]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

Order [Extending Return Day].

For good cause shown, the return day or date under the citation issued out of the above-entitled cause and court on appeal to the Circuit Court of Appeals for the Ninth Circuit is extended for thirty days in addition to the thirty days mentioned in said citation, or said plaintiff is to have sixty days from this date in which to make return under said citation and file his record on appeal with the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Done in open court this 3d day of July, A. D. 1912.

THOMAS R. LYONS,

Judge.

Entered Court Journal No. I, page 317.

Filed Jul. 3, 1912. E. W. Pettit, Clerk. By ————, Deputy. [71]

[Bill of Exceptions.]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 840–A.

JAMES T. BARRON,

Plaintiff,

vs.

CLAIRE J. ALEXANDER,

Defendant.

BE IT REMEMBERED, that the above-entitled cause came on for hearing before the Honorable THOMAS R. LYONS, Judge of the District Court for the First Division of the District of Alaska, at Juneau, in said District aforesaid, on the 16th day of March, 1912,—

Messrs. WINN & BURTON, appearing for plaintiff;

Messrs. Z. R. CHENEY and R. W. JENNINGS, appearing for defendant;

and thereupon a trial of said matter was had and conducted on the 16th, 18th, 19th and 20th days of March, 1912, whereupon the following proceedings were had, to wit: [72]

COURT.—Proceed with the trial, gentlemen.

Mr. WINN.—I propose to get to the issues of the case—I will read the pleadings.

COURT.—I think I can get more from the pleadings if you will just state the substance of them. I have heard the pleadings read before.

[Statement by Mr. Winn.]

Mr. WINN.—I know it. I expect there is little change in them. I don't know—very little. The amended or supplemental complaint, if the Court please, the first and second paragraphs, that part pleading the title from Robertson to Barron. His title was a deed from Robertson to himself, and I think you will find the survey under the homestead scrip act was made before Mr. Barron bought it. Then the third paragraph goes ahead with the proceedings had in the Land Office, stating we had a Receiver's receipt. While the practice is somewhat changed in the Land Office in regard to the issuance of Receiver's certificates, we expect to have to meet this issue in the case because they have denied those two paragraphs. Then we will have our proof on that to the extent that—that the property has been surveyed, application for patent made, and all the proof has been submitted to the Land Office for the patent, for the issuance of Receiver's certificate.

Mr. CHENEY.—Don't claim it has been issued, yet?

Mr. WINN.—Well, I say Receiver's certificate—it is my understanding under the present practice don't issue his certificates like they used to. The proof, I will submit it—that the proof of the claim has been somewhat held up on account of a new regulation just issued by the Department of the Interior which requires an additional affidavit in regard to how the property is located with [73] respect to the water. Heretofore you have been able to file affidavits and to show it simply bordered on the navigable water and no other claim within eighty yards, and under that

new regulation which has just come out we have, I don't know, maybe fifteen or twenty applications sent back for the purpose of supplying the affidavit in regard to the navigability of the water outside of the beach and the shore water that bordered upon. That proof has been filed to-day; just a recent request for it and Mr. Dudley, who is prosecuting the proceedings for patent, didn't know anything about that, and on looking over the title's sufficiency, I think, there was a request for these affidavits. And these affidavits have been submitted and we will have the Register of the Land Office here who will show that all the proof necessary for obtaining the Receiver's certificate has been complied with. Now, we will have to do that under the issues here because they deny all these proceedings in the Land Office, denying the survey, denying the deed from Robertson, denying the whole thing *in toto;* so we will be put to the necessity of proving such title as we have.

The fourth paragraph is a paragraph which sets up matters which I state to your Honor might in some respects—kind of sets them up for the purpose of not being outdone by the defendant in this case. Your Honor will remember that in the former case in which an answer was filed setting up a lot of matters about Chatham Straits being a navigable body of water and how wide it was and abounding in salmon and fish and he had gone to great expense in building a fish-trap and so forth and so on—all those matters. Now, I don't know just what place they have in the case so far as the defendant is concerned. The question whether he is a poor man or a rich man or has gone to

a [74] great amount of expense or a less amount of expense, I don't think would cut any figure so far as he is claiming a fish-trap site and a fish-trap site only, because the law prescribes his right, and it don't make any difference what his intentions are or whether rich or poor, because his trap location is a matter that we contend is a thing apart entirely from any upland claim, and if he has any rights to the water he has such rights as are prescribed by law and that only. But, however, as your Honor said when Mr. Burton presented a motion to strike that portion out of the former answer, you said, I think, that possibly some of these matters might be proved under a general denial, but in an equity cause you would allow them to stand, which I think is a perfectly just rule. However, in this fourth paragraph which we will plead we have set out considerable matters—that Mr. Barron is the president of the Thlinget Packing Company, which is running a cannery at Funter Bay, and it will appear, I think, in evidence in this case that he is a large stockholder, probably owns two-thirds or three-fourths of the stock, and that this cannery is a cannery of about the capacity of three thousand cases a day, and that in order to keep up this business and as a matter of necessity he took up this piece of land for, it will probably, may be, appear, for two or three purposes. In the first place, it furnishes a harbor for certain purposes which the evidence will show, and, in the second place, that it was a fish-trap location. I think that his deed from Mr. Robertson will show that Mr. Robertson attempted to deed the survey that he made of the upland and whatever rights he had there

to the fish-trap location. Now, I believe, if it please the Court, in so far as the allegations are concerned, and I just simply state this to show your Honor and so you will know my [75] contention and the contention I will make in the introduction of some of the evidence in the case. I do not think really when you get down to the bottom of it that generally the intention that Barron had in taking up that particular piece of land has any place in this court at all, because under an application under the soldiers' additional scrip act that is a matter absolutely you have to deal with the Land Department on. If after filing your application and prosecuting it to a stage that you are entitled to final Receiver's certificate, why, then there can't be any question raised anywhere as to good intentions. But, as I say, I don't believe that the intention of Mr. Barron, and I expect to use that fact, has anything in the world to do with the case, because of the fact that is a question if he owns the upland what is his rights in front of it. Now, that is the material question. But I have pleaded these matters in here, and I will state to the Court fairly, for the main and particular purpose of showing, if such a question is in the case, to show good faith and to show that this is a necessary piece of land to be used for two or three purposes. Now, I believe that is about the sum and substance of the complaint, and we contend—yes, here is another paragraph where we contend that his fish-trap is so constructed that it completely, for all practical purposes, cuts off our right of way from the navigable waters up to our land, or what may be said to be our land. We don't mean to

run a boat ashore, but we want to build a wharf out there for the purpose which will appear. We would have a right to build a wharf and have a right to reach it if we want to use it for a mooring ground or station as claimed here. Of course, have a right of way for access to it. It may be that in the trial of the case [76] the testimony that I have alleged in that paragraph will aid the Court in discovering—in ascertaining the facts as to whether or not they were obstructing our right of way to this harbor or to our upland, and in pleading these facts we will show the necessity of it, show how it has been used, and so on and so forth. It may be these are matters that will aid and assist the Court in that respect.

Then, coming down to the last question in the case, as to whether they are obstructing our right of way from our upland out to deep water. Now, that is just the purpose. The courts go so far, some even go so far as to say is free access; I think one of the latest expressions of the Circuit Court of Appeals is "free access," and it being in the way of estoppel there, and having a deed and right of way and so forth—I think that some of the latest expressions of the Circuit Court of Appeals was that all and from all portions of your land you are entitled to free access. That means absolutely unobstructed. And we will go further in this case, if the Court please; that such completion of this trap absolutely shuts us out of and on to this. That is all there is about it. And we will show to the Court here the further allegation here that when the preliminary restraining order was granted in this case there was a motion made for the dissolu-

tion of that restraining order, and we will show that, I think, the material question that the Court was trying out at that time was as to whether or not he had cut us off from our right of way, and was basing your opinion absolutely upon the theory that Mr. Alexander testified to in that case, that is, that he had completed his trap. I don't think it is going to be contradicted in this case but what Alexander absolutely did testify to that on the [77] other trial. If he does contradict it I can show that he has testified falsely, because he did admit it was complete before. Now, you were dealing with one condition of affairs at that time. Now, you are dealing with another condition of affairs, in other words, that he violated his oath and went out there afterwards and drove at least sixteen or eighteen piles and extended that lead clear out from shore. I don't think they are going to dispute that. They can't successfully do it in this case. So, in the case as presented to your Honor will be as to the good intention—if the good intention is in the case at all—of Mr. Alexander, and as to what he swore to, and what your Honor based your opinion at that time. I mention that, if the Court please, to show that the case stands and will stand in a different attitude before the Court at this time than it did before. Of course, got a different trap and several other different matters that wasn't gone into. Mr. Barron wasn't here, and I think you will remember that the complaint in that case was verified by Mr. Barker. Mr. Barron wasn't here and had left some six months prior to the time this trial was commenced. He left in the previous September, I think, and all he knew

was what had been communicated to him.

Now, the answer in this case is about the same as the other answer, sets up a history of their building the trap, that they expected to make about ten thousand dollars a year and these matters. I don't know what figure they cut. And we have filed a reply and we have admitted it is good fishing ground—that is admitted in the case. And we also state that we took that up for that purpose, are going to devote it for fish-trap business and wharf, station and appropriate facilities, and so forth, in the first instance, [78] and we again reiterate, and when they say they didn't construct the trap out but have stated in the answer, they deny that they constructed the trap so that the lead went out and was fastened up to the upland and in fact never out of water from the pots or fillers out to our upland, and they had some kind of a contrivance which will be described by attaching a cable on which was hung the web—they didn't drive any piles clear out to the upland but they did put the lead up there. It is customary with—it will be shown in the construction of these traps—to always get up to the shore line as close as possible and to get up so that your lead any way will go out so far as the line of ordinary tide. They went even beyond this in this case and fished it. And under our view we expect the property in the case—well, we expect to prove such title to that—I don't think there is any question about the title—we will prove to the Court the title to the upland.

COURT.—The defendant make a statement?

Mr. CHENEY.—We will reserve our argument

(Testimony of C. B. Walker.)

until the case is through.

COURT.—Very well; proceed, gentlemen. Call your first witness.

Mr. WINN.—Mr. Walker. [79]

[Testimony of C. B. Walker, for Plaintiff.]

C. B. WALKER, being duly called and sworn, testified as follows on behalf of the plaintiff.

Direct Examination.

Q. (By Mr. WINN.) What is your official position, Mr. Walker?

A. I am the Register of the Land Office at Juneau, Alaska, Juneau District.

Q. You have Mr. Walker's initials, have you, Mr. Robertson?

REPORTER.—Yes.

Q. (By Mr. WINN.) How long have you been Register of the Land Office at Juneau?

A. For a little over two years.

Q. Now, I will ask you, Mr. Walker, if you have any papers in the office of the Register and Receiver of the Land Office at Juneau in the matter of the application for patent to United States Nonmineral Survey Number 804, which is designated as the homestead of V. A.—V. A. Robertson?

A. Yes, sir; I have.

Q. Now, that—the proceedings in the application for patent in that case, I will ask you if you have any other way in the Land Office of referring to them or designating them, other than the application for

(Testimony of C. B. Walker.)

patent to the grounds contained in U. S. Survey No. 804? A. No.

Q. Well, you have a serial number, have you?

A. We have a serial number and the application occurs, of course, in the name of that person who seeks to get title to the land.

Q. Yes.

A. The serial number in this case is serial number 01472.

Q. You have the—have you there a copy of the—of one of the original maps or plats upon which the application for patent was based? [80]

A. I have the office record of the files in that case described as U. S. Survey 804 and it is certified by the Surveyor-General for Alaska as the correct plat of the claim.

Mr. WINN.—Has your Honor the original complaint here?

COURT.—Yes.

Mr. WINN.—Now, there are some exhibits in this case.

REPORTER.—I have some exhibits.

Mr. WINN.—Maybe better to get those exhibits.

Mr. CHENEY.—If the Court please, they offered the exhibits—

Mr. BURTON.—That is in the former case.

Mr. WINN.—I would rather have it; shows the courses. I want to refer to that map or plat. Now, I don't know whether it is a certified copy. I don't know whether you are going to raise any objection to a certified copy.

(Testimony of C. B. Walker.)

Mr. BURTON.—It is a certified copy.

Q. (By Mr. WINN.) Now, Mr. Walker, will you refer to the plat, the official plat or map of this survey in question and state that—you had the original with you—I will ask you is the map which you have referred to, if you know, which I hand you here now, is it a copy of the map and plat which you just referred to in your answer to my question?

A. Well, the map—I have the office plat and not the original. This is a quadruplicate of the original which is either in the Surveyor-General's office or the General Land Office—

Q. Yes; I see.

A. —and this that you now hand me is a—is a certified copy of one of the quadruplicate plats in the office of the Surveyor-General and is the same as the one I have.

Q. Same as the one you have filed in your office?

Have you any objection to offering this in evidence?

Mr. CHENEY.—I think it is in evidence.

COURT.—Just offered in evidence in the preliminary hearing. [81]

Mr. CHENEY.—Marked as an exhibit.

COURT.—Counsel offered that on the trial, Mr. Cheney, merely offered on that preliminary hearing and that doesn't make it an exhibit on this trial unless reoffered.

Mr. CHENEY.—You don't consider that as an exhibit on this trial because offered before?

COURT.—No exhibits at the trial before are a part of this trial unless they are reoffered.

Mr. CHENEY.—Well, if the Court please, we will state our position in this matter. We will object to the introduction of any evidence on this trial as to what steps they have taken to obtain title to this ground since the fish-trap was driven there by Mr. Alexander a year ago. Whatever steps they took prior to that time, of course, when the injunction was denied last spring is competent to go in in this case, but anything that they have done since that why isn't competent to go in because if the plaintiff—if the defendant was there rightfully at that time, why there is nothing now that they could introduce that would change the situation, and any way we will object to the introduction of a whole lot of matter here on this trial as to what steps they have taken because it is immaterial. If they have got their final certificate, that is the thing they should introduce on this trial. Now, on the last trial of this case, your Honor, I maintained, you will remember, all through the trial that they had absolutely no title to this ground and when the decision—there was no question about the law; they hadn't even filed an application in the United States Land Office; they hadn't even filed a plat in the United States Land Office. No plat on file there at that time. There was some kind of a plat lying in the Land Office but never had been marked "filed." No application had been filed. No scrip [82] had been filed there with them. At that time they had absolutely no more title to that land than I had or Mr. Alexander or anybody else. I think that was the condition of the case at the time of the last trial. Now, if they can go on and let a

man build on there and then subsequently obtain title and try to oust the defendant on that kind of evidence, it wouldn't be—they couldn't be permitted to do a thing of that kind, and I say any way what is the difference what steps they have taken? If they haven't received their final certificate they are no better off than they were before. If they have their final certificate, let them introduce it, and I think we ought to know right now whether they have their final certificate or not. I don't know as I made myself plain. I say anything they can show now that they have done before Mr. Alexander put his trap there and started to use it and started to fish with it, they could introduce that now; could introduce it before. But any additional evidence, why we object to it. Of course, if they had the final certificate in the last trial and introduced it, they could introduce it now. But they had nothing to show any title on the last trial and I don't think they could introduce it now, and any way, what do these steps, which he states as true, amount to if it doesn't result in anything; if he doesn't get his final certificate and he says he hasn't got it?

COURT.—I am not certain at this time just how far the doctrine of relation might apply, having initiated proceedings to procure patent prior to the beginning of suit and subsequently obtaining patent. I am not just prepared to say how far the right that he subsequently acquired might relate, but I will hear the evidence.

Mr. WINN.—Yes, sir. The Land Office in several well-considered [83] cases, just lately rendered

E40 a
Barron to Alexander
Pltfs Exs
Recd in D&R

Recd in
Ex on Trouble
Index Copied in
D & R

PLAT

OF

U. S. SURVEY No 804

OF THE

S A Homestead Claim

UNDER, ACTS OF MAY 14 1898, AND MARCH 3, 1903

OF

V A ROBERTSON

SITUATE

On Chatham Strait about
2 miles south of Funter Bay

DISTRICT OF ALASKA

SCALE OF	2.00	CHAINS TO INCH
VARIATION	31° 00'	EAST
AREA	5.27	ACRES

AS

SURVEYED BY

Charles E. Davidson

U.S. Deputy Surveyor.

October 31 and November 1, 1908.

The original field notes of the survey of the Soldier's Additional Homestead Claim of V.A. Robertson

from which this plat has been made, have been examined and approved, and are on file in this office; and I hereby certify that they furnish such an accurate description of said claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects and permanent monuments as will perpetuate and fix the LOCUS thereof.

And I further certify that this is a correct plat of said claim, made in conformity with said original field notes of the survey thereof. And the same is hereby approved.

Surveyor General's Office.

Juneau, Alaska. June 16 1909.

Signed Wm L Distin
Surveyor General of the District of Alaska.

Certificate

Office of the U.S. Surveyor General
Juneau, Alaska. March 24 1911.

I hereby certify that the map hereon delineated is a full, true and correct copy of the original and approved plat of the survey of said tract on file in this office

Wm L Distin
U.S. Surveyor General for Alaska

Meanders		
No.	Course	Distance
1	S 39° 31' E.	6.15 Chains
2	W. 86° 03' E.	3.83 chains

Scale of Chains

0 1 2 3 4 5 6 7 8 9 10 11 12

and in which case it was held that *when sent* a surveyor out it segregated it from the public land and then nothing in the world could keep you from getting a patent provided, of course, you complied with the law and no other claim within eighty yards and is not on a forest reserve, and to show that this patent, if offered in evidence, was dated November 28, 1908, which, of course, antedates any claim that he ever made here, and I expect to bring it down to the present time, and any proof we may show of his receiver's certificate may be all right but anything—

Mr. CHENEY.—In regard to that matter, I would just like to say that this survey was a private survey by Mr. Robertson and I claim that what the Land Office wants with a private survey is made regularly; doesn't segregate the land and doesn't confer any title. It was made in 1908 by private survey. They have changed the land rules now, but when they did that Mr. Robertson made this survey simply as a private survey.

COURT.—I will hear the evidence.

Mr. CHENEY.—Of course, there is nothing now offered.

Mr. WINN.—I have offered this in evidence and ask if you have any objection, and I ask that this exhibit be marked as an exhibit in this case.

COURT.—You still renew your objection?

Mr. CHENEY.—Yes.

COURT.—May be admitted and marked.

Mr. CHENEY.—Exception.

(Marked Plaintiff's exhibit "A.")

Mr. JENNINGS.—Let me understand. Do you offer that plat as showing the claim you claim now, or the land claimed by you at the time you started that work there; had the survey made?

Mr. WINN.—Why, this is the claim we are claiming now. We [85] have claimed it and our title dates back to 1908, in respect to the time Robertson initiated the survey. I am going to prove—we have a deed to this property and in fact the application has been made out in Mr. Barron's name. The application in fact is made in Mr. Barron's name. This is the origination of our title and I expect to show, as the Land Office says and repeatedly says—I am not mistaken about it, because they were my cases. I will bring the cases up to show. At the present time after you initiate a survey, if you go on and use ordinary diligence, such as the Land Office simply requires, and if you are not on a timber reserve and not in conflict within a space—within so many rods of it, you will then ultimately succeed provided you have gone on there in good faith and are prosecuting your claim for patent as quickly as you can. Nobody can adverse us now, because the time for an adverse claim has expired and the proof will be shown; that the proof has been filed in our showing that is required, and he is about ready to send up the papers; simply going on to show what we have done and the kind of title filed. Want to rebut any general statement they might allege and want to show title, or you couldn't convey it, that is, unless

(Testimony of C. B. Walker.)

had some right to the upland.

Mr. CHENEY.—Suppose this application counsel is making about a case in point—he can try before the Court. Mr. Burton didn't apply for this remedy at all when this case was tried and when we built our fish-trap.

Mr. WINN.—We will show we have a deed from Robertson and before Alexander ever thought of fishing this place except for the Alaska Packers' Association. [86]

Mr. BURTON.—The deed was offered in evidence.

Mr. WINN.—We will follow it up.

COURT.—The Court will determine these matters. I will admit the evidence and I will hear you after the evidence is all in.

Q. (By Mr. WINN.) Now, I will ask you, Mr. Walker, if there has been any application for patent made and filed in your office for the ground embraced in United States Nonmineral Survey No. 804?

A. Yes.

Q. Did you give to the Court the date of that application for patent and in whose name it is made?

A. August 30, 1911, James T. Barron, the assignee of Richard J. Whitten, filed his application for patent for this tract and to the tract.

Mr. WINN.—If it please the Court, we don't want to deprive the Land Office of its papers, but we would like to have these papers identified and with the privilege of substituting a certified copy. I didn't know, of course, until the answer was filed in this case that they denied this title and denied these pro-

ceedings because the Land Office record absolutely shows they have been made there and I didn't suppose—

COURT.—Presume there is no objection to the evidence on account of the desire to submit certified copies?

Mr. CHENEY.—The only matter is if we should want to look at them, they wouldn't be here. I don't know what to think. If they want to introduce certified copies they ought to do it, for a month after trial, if introduced now and taken away to the Land Office, don't give us an opportunity to examine them.

COURT.—The Reporter can go down and copy them. Wouldn't be safe for the Land Office to deliver some of their original entries. [87]

COURT.—Whenever required the Reporter can procure *them, so long as proceed with this now.*

Mr. JENNINGS.—If the Court please, in order to shorten the record and to keep from making objections all through the case, I would like to state now that the complaint in this case alleges that on or about the 14th day of March, 1911, the above-named defendant entered upon the survey number 804 and upon the water in front of survey number 804 and built a fish-trap, and so forth. Our position is that anything done by Mr. Barron to secure title after March 14, 1911, after the case,—after the date when it is alleged we went on there and built a fish-trap and destroyed his ingress and egress is incompetent, irrelevant and immaterial on the ground that if he did that—if we had the fish-trap there when

(Testimony of C. B. Walker.)

he took those steps, why then he took those steps with the full knowledge that we had a fish-trap there, and if it be understood that our objection goes all through the record to any steps taken by Mr. Barron after that time, won't have to be repeating it all the time.

COURT.—I presume that may be understood.

Mr. WINN.—We are willing.

COURT.—Show that the objections go to all the entries concerning the title you have reference to—concerning the steps taken to procure title subsequent to what date?

Mr. JENNINGS.—The 14th of March, 1911.

COURT.—Very well; let that be so understood.

Q. (By Mr. WINN.) Now, Mr. Walker, the application for patent which you have just stated, that was made for the land embraced in this survey, is under what date? I want to get it so we can identify it to aid Mr. Robertson in getting copies of it, for we shall ask Mr. Robertson to copy these from the Land Office just as soon as he can and they are not [88] so long but what they can be gotten out, your Honor.

A. The date, then, the oath was issued to the applicant in the application—on August 25, 1911.

Mr. JENNINGS.—August?

Mr. WINN.—Now, the paper, if it please the Court, we offer it in evidence and in order to save reading in evidence—

Mr. JENNINGS.—Judge, in addition, as just stated, that this trap was actually finished on the 14th of March, so my objection will be admitted to,

(Testimony of C. B. Walker.)

say, the 14th of March, or up until the time that the trap was finished.

Mr. CHENEY.—And that was at the trial—I think the trial was on the 23d of March.

Mr. WINN.—Do you contend that the trap was completed on the 23d of March and never had anything to do with it afterwards?

Mr. CHENEY.—It is a matter we will discuss, as we claim it was fished, and used it all summer.

Mr. WINN.—I want you to state whether it was complete when that temporary restraining matter was up.

Mr. JENNINGS.—Well, just a moment. It is of considerable importance and I want to get the objection.

COURT.—Very well.

Mr. JENNINGS.—If the Court please, I guess that objection is all right. Its position on there can be well known.

COURT.—Very well. Proceed, gentlemen.

[Plaintiff's Exhibit "G."]

"Barron v. Alexander.

Plaintiff's Exhibit 'G'—R. E. R.

United States Land Office, Serial No. 01472

Juneau, Alaska. Receipt No. 4675

Filed Aug. 30, 1911. C. B. Walker, Register.

4–008–a.

Form approved by the Secretary of the Interior, November 12, 1907. [89]

Department of the Interior.

SOLDIERS' ADDITIONAL HOMESTEAD ENTRY BY ASSIGNEE.

U. S. Land Office, Juneau, Alaska, No. ———.

Application.

I, James T. Barron, (male), a resident of Port-
(Give full Christian name.) (Male or female.) (Give
land, Oregon, the legal assignee of Richard J.
full postoffice address.) (Give full Chris-
Whitten, beneficiary (or beneficiaries), under Sec-
tian name of beneficiary or beneficiaries.)
tion 2306, Revised Statutes of the United States, granting additional land to soldiers and sailors who served in the Army or Navy of the United States during the War of the Rebellion, do hereby apply to enter the lands embraced in U. S. Surveys Nos. 202, 748, 749, 750 and 804, situate near Funter Bay, Alaska, containing 32.32 acres, within the Juneau Alaska, land district, as additional to the original homestead on the NE.¼ SW.¼ Section 18, Township 1 S. Range 20 W., Ark. Meridian, containing 40 acres; entered at the United States Land Office at Washington, Ark., per homestead entry (or entries) No. 465, dated January 22, 1868; and I do solemnly swear that I am a native-born citizen of the United
(State whether native born or naturalized; if naturalized, cer-
States, over twenty-one years of age; that I am the
tified copy of naturalization must be filed with this application.)
identical person named in the accompanying assignment of Anna Dunne, the assignee of Richard J. Whitten, the original beneficiary (or beneficiaries) entitled to make soldier's additional homestead entry (or entries) of 80 acres of public land, under the pro-

visions of Section 2306, Revised Statutes, as additional to the original homestead entry (or entries), above described; that I purchased same in good faith and am now the holder and owner thereof; that I have not made an entry of public lands as such assignee, and that I have not **[90]** sold or disposed of said right of entry but that the same is vested in me unimpaired; that as such assignee I present herewith the said assignments, together with proof of right of entry granted to the said beneficiary (or beneficiaries) under the provisions of said Section 2306.

*I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined the same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit or coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of

---

*Note.—If applicant is not personally acquainted with the character and condition of the land applied for, affidavit as to character and condition may be made by any credible person having the requisite knowledge.

°°Note.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 5392, R. S., below.)

the year by any person or persons; that said land is essentially nonmineral land; that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian, and is unoccupied, unimproved, and unappropriated by any person claiming the same other than myself.

JAMES T. BARRON.
(Sign here, with full Christian name.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by ———); [91] that I verily believe affiant to be a credible person and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in Juneau, Alaska, this 25th day of August, 1911.

GUY McNAUGHTON,
Notary Public for Alaska.
(Official designation of officer.)

My commission expires October 24th, 1912.

United States Land Office at ———
———, 191——.

It is hereby certified that the above application was this day received with the attached assignment of soldier's additional homestead entry that same might be noted on the tract books and further action thereon suspended until advice from the Commissioner of the General Land Office; that the fees and

commissions were tendered in full, and that there is no prior or adverse right to the lands applied for.

_____,

Register.

_____,

Receiver.

Revised Statutes of the United States,

Title LXX, Crimes, Chap. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

(Note.—In addition to the above penalty, every person who, knowingly or willfully in any wise prosecutes the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.)

#997. 1/82. 4–008a. Soldier's additional homestead entry by assignee. U. S. Land Office. No.

(Testimony of C. B. Walker.)

———. Application. Name ———. Date ———. Section ———, Township ———. Range ———. Notice of Action. (Space below for use in General Land Office)." [92]

Q. (By Mr. WINN.) Now, Mr. Walker, after the application for a patent was filed, that you have just referred to, what was the next step taken by Mr. Barron looking towards prosecuting his application to completion?

A. Well, the application, as I used the word, refers to more than the formal application to which Mr. Barron signed his name, but merely to other papers that I may enumerate here if you wish.

Q. Yes. A. There is—

Mr. CHENEY.—We object to that, because it is immaterial, if your Honor please—because, what is the use of introducing all these papers, if he can answer in one question just the condition of the title at this time in the Land Office. Mr. Walker can tell that in three words.

COURT.—Are you objecting to all the steps that have been taken and if you are willing to confess that the steps have been properly taken, that is providing—reserving your objection to its materiality or competency?

Mr. CHENEY.—Yes.

COURT.—But if you are willing to concede that the steps were properly taken, why I see no reason then in submitting the different papers that were necessary to procure patent.

Mr. WINN.—That will shorten the case quite

materially, your Honor, if they will admit that all the necessary steps which Mr. Walker will testify concerning have been taken without the introduction of the papers, will shorten the record.

Mr. CHENEY.—Up to a certain time. Mr. Walker can say they have completed their proof up to a certain point.

Mr. WINN.—Now, suppose he states all the proof has been supplied in the case which his office requires.

Mr. CHENEY.—Well, he hasn't issued any final certificate. [93]

COURT.—Well, are you willing to confess that whatever proof is necessary to procure patent has been regularly submitted to the officers—the Register and Receiver?

Mr. CHENEY.—Yes; we will do that only with our objection. It is immaterial.

COURT.—Certainly.

Mr. CHENEY.—And on the ground stated by Mr. Jennings with the objection.

COURT.—Yes.

Mr. WINN.—Well, then, if it is understood and agreed by and between counsel in this case that Mr. Barron, after he made his application for patent under the Soldiers' Additional Homestead Scrip Act for the property contained in United States Nonmineral Survey Number 804, has complied with the laws, rules and regulations and has submitted to the United States local land office at Juneau, Alaska, all the proof that is necessary up to the obtaining of a

(Testimony of C. B. Walker.)

receiver's certificate.

Mr. CHENEY.—Well, Judge, that is on the condition he is going to testify to that, of course.

Mr. WINN.—Well, he isn't if it is admitted.

Mr. CHENEY.—But I want to know if Mr. Walker says that isn't so.

Mr. WINN.—Why, no; you said that isn't so.

Mr. CHENEY.—We will admit it if Walker says so; maybe he isn't going to say so.

Mr. WINN.—Oh, I didn't understand. I thought you turned around and admitted that was true.

Q. Well, now, Mr. Walker, I will ask you to state if all the proof that is necessary to be offered for the obtaining—I withdraw that question. I will ask what proof on the part of Mr. Barron has been filed in your office that is necessary for you to forward the papers to Washington for the obtaining [94] of patent.

Mr. CHENEY.—Well, I should say how your question should be put in regard to that property. I beg your pardon.

Mr. WINN.—Of course, only went on for that purpose. If not, I will put it in the alternative.

Q. Explain what is lacking.

A. I would like to ask you, Mr. Winn, in the first place, Funter Bay is on the mainland, is it not?

Q. It is on Admiralty Island.

A. Well, assuming that, and I think that was stated at the time the application was filed that there is no question as to the priority and assuming that this is outside the reserve, or that it is in the reserve,

(Testimony of C. B. Walker.)

and you are a claimant there prior to the reserve order and that there is no question as to that, as to the right of the claimant as against the Tongass National Forest interests, the papers or the proofs as filed are all that this office would require if there are no other objections in issuing a final certificate. The proofs are sufficient to permit the issuance of a final certificate in my judgment and certificate would be issued were it not for the fact that the—the evidence of the right of the original holder of the additional soldier's homestead right, namely, the soldier in the application of Mr. Barron, is not submitted with the case, except by referring to evidence, which I presume is in the General Land Office.

Q. Well, now, you know that this island is not in any forest reserve, don't you, Mr. Walker?

A. Well, you worded your question in such a way that I thought that I had better assure myself as to that.

Q. Well, I have—I thought that was sure, your Honor. I can show that there isn't any question of timber reserve in this case, but I don't know whether you can tell by looking at [95] this map or not, Mr. Walker. It is a map we have here which is termed "Lynn Canal, entrance to Point Sherman, Alaska." It is a Government chart. I simply refer to it so you can identify it. Now, then, here is Funter Bay. Here is this fish site in controversy.

A. This is Hawk Inlet. Then, it isn't in the Forest Reserve.

Q. This is Hawk Inlet. It isn't shown here. This

(Testimony of C. B. Walker.)

map don't show what it is.

Mr. BARRON.—There is no forest reserve.

Mr. WINN.—Well, Mr. Walker has just answered that. For the reason the witness has answered a question concerning this map, if it please the Court, I desire to have it marked for identification.

Mr. CHENEY.—Hasn't got this marked on it. Just a chart.

Mr. WINN.—Just a chart of Lynn Canal and Point Sherman.

Mr. CHENEY.—What did Mr. Walker say about being in a forest reserve?

Mr. WINN.—Said it was not in a forest reserve.

COURT.—May be marked Plaintiff's Exhibit "B" for identification.

Q. What additional answer do you desire to make, Mr. Walker?

A. Why, I think my answer is sufficient unless Mr. Winn wishes more.

Q. (By Mr. WINN.) Now, I understand you, then, to say, Mr. Walker, since you have examined the chart that I have just presented to you and finding that this land is north of Hawk Inlet, that it is not in any timber reserve?

A. No; it is not in a timber reserve.

Q. Then, all the proof that is necessary under the laws, rules and regulations so far, and so far I mean as any orders that you have had from the Department up to date, Mr. Barron has complied with the law with respect to pursuing his title up [96] to the issuance of a receiver's certificate, with

(Testimony of C. B. Walker.)

the exception of what you mentioned about this scrip? A. Yes, sir.

Q. Yes. Now—

Mr. JENNINGS.—I note an exception, Judge.

Mr. CHENEY.—The witness answered something wrong about the soldier's scrip or something.

Mr. WINN.—Isn't anything wrong about it. If it please the Court, at this time, we desire to have this assignment—

WITNESS.—This is the assignment.

Q. What is this?

A. That is the application.

Mr. WINN.—We desire to offer in evidence, if it please the Court, this assignment of the scrip which Mr. Walker has just testified concerning for the reason that we want to show the plaintiff used—in our explaining this situation about the scrip.

COURT.—It may be received. Any objection?

Mr. CHENEY.—Is that the one?

Mr. WINN.—Yes; that is the one he testified concerning.

Mr. CHENEY.—I understand. May I ask the witness a question?

COURT.—Certainly.

Q. (By Mr. CHENEY.) Mr. Walker, I understand that the soldier's scrip isn't here; wasn't filed in your office?

A. Only—only the assignment from the last owner of the right to Mr. Barron is with the papers and on that assignment is a reference to the case in another land office and consequently to the case in the

(Testimony of C. B. Walker.)

General Land Office where the further evidence of the right, I presume, will be found.

Q. But you are not sure of that?

Mr. WINN.—Well, I understand now. If you will just wait, I am going into that. **[97]**

COURT.—Yes.

Q. (By Mr. WINN.) Now—

COURT.—You offer that in evidence?

Mr. WINN.—Yes.

Mr. JENNINGS.—We object, incompetent, irrelevant and immaterial.

COURT.—Objection overruled. May be received.

(Plaintiff's Exhibit "C" marked and received.)

Mr. WINN.—We may now ask, if it please the Court, that the Reporter be permitted to copy this in the record or make a copy of it so not to deprive the Land Office of these papers, as I understand Mr. Walker wants to send up the papers right away—the proof has been completed.

COURT.—Very well.

[Plaintiff's Exhibit "C."]

"Barron vs. Alexander, Plff's. Ex. C.

Rec'd in Ev.—R. E. R.

For proof of claim, see application of Andrew Wigeby, of Shelby, Montana, assignee of Richard J. Whitten, filed at Great Falls, Mont., for SE.¼ SW.¼, Sec. 31, T. 32 N., R. 1 E., M. M., 40 acres.

United States Land Office,
Juneau, Alaska, Serial No. 01472
Filed Aug. 30, 1911. Receipt No. 4675
C. B. Walker, Register.

ASSIGNMENT BY ASSIGNEE.

Whereas, Richard J. Whitten, who made original homestead entry of the N.¼ SW.¼ Sec. 18 T. 1 S. R. 20 W. Arkansas, of which the NW.¼ SW¼ was canceled Aug. 12/72, for conflict, at Washington, Arkansas, on Jan. 22, 1868, and is entitled to enter 120 acres additional public land under the provisions of Sections 2306 and 2307 R. S., U. S., has executed proof papers, and assigned such right of entry to the undersigned, by an assignment in writing, dated June 27, 1908, and the undersigned has sold 80 acres of such right of entry [98] to James T. Barron.

FOR VALUE RECEIVED, I, Anna Dunne, assignee of the original beneficiary, Richard J. Whitten, do hereby sell, assign and transfer unto the said James T. Barron and his heirs and assigns forever, 80 acres of the said right of entry, and authorize the said James T. Barron, his heirs and assigns, to make such entry of public land and receive patent therefor.

I further state, under oath, that I purchased said right for a valuable consideration and that I have made no other sale or use of the same and that I was the bona fide owner of said right when this assignment was made.

Signed, sealed and delivered this 3d day of Dec., 1909.

ANNA DUNNE. (Seal)

Witnesses:

(1) JAMES DEERING.

(2) TED E. COLLINS.

(Testimony of C. B. Walker.)

State of Montana,
County of Lewis & Clark,—ss.

On this 3d day of Dec., 1909, before me, personally came Anna Dunne, to me well known as the person who executed the foregoing assignment, and acknowledged the foregoing assignment to be her act and deed for the purposes therein named; and being duly sworn, says the foregoing statements are true.

JAMES DEERING,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires April 19, 1912.

(James Deering—Notarial Seal—State of Montana.)"

Q. (By Mr. WINN.) Now, Mr. Walker, in regard to this assignment which we have just offered in evidence, I understand that it purports to be an assignment by—it is Mrs. Dunne? [99]

Q. Anna Dunne. Well, purports to be an assignment from the assignee to Mr. Barron of the remainder of some scrip that has been offered in some other application for patent in some other land office other than the land office at Juneau? A. Yes, sir.

Q. Yes. Now, I will ask you if it is not a fact that such application, if it is made, would be in the United States Land Office at Washington, D. C.?

A. Yes, sir; it would.

Q. Now, what—what is your next step that you take with these papers that you have now? You say

(Testimony of C. B. Walker.)

the proof of the case incumbent upon Mr. Barron to make has been complied with. What is the next step to be taken so far as your office is concerned with the proof that is now—which has been submitted to that office?

A. With regard to this particular—

Q. Yes, sir. A. —particular case?

Q. Yes, sir.

A. I would send it to the commissioner with—with possibly a statement that there is no adverse claim of record in the office against it.

Q. The time for adverse claim has expired, has it not, Mr. Walker?

A. I think so; yes, sir; it has expired.

Q. Now, I will ask you, Mr. Walker, if the practice in your Land Office has been such that for instance if a piece of scrip of the kind that is in question in this case should be filed in your office on an application for a patent in any particular given survey and then all that scrip sent on with that application for patent to the General Land Office, that the same applicant or the assignee of the first applicant can still come in your office here and make application [100] for patent on the residue of scrip that may be left over from the first application for patent?

A. Yes, sir.

Q. That has been done? A. Yes, sir.

Q. Many times here, has it not, Mr. Walker?

A. It has been done quite often.

Q. Yes, sir. You know it has been done through your office on some occasions, do you not?

(Testimony of C. B. Walker.)

A. Yes, sir.

Q. Applications for patent. Now, then, should this application for patent go back to Washington, sent to the Commissioner's office and it should be ascertained that there wasn't any scrip there in that office to cover this particular survey. I will ask you as to whether or not that, under the practice, if Mr. Barron would not be permitted, after notice being given him, to cover this with any other scrip he might buy?

A. Yes, sir; it occasionally—circumstances like that have occurred and they have permitted, as they term it, a substitution of valid scrip for scrip which is found to be fraudulent.

Q. For instance, Mr. Walker, I will ask you if the practice in your office, where there is uncertified scrip of this nature, is different from the practice which you have in your office with reference to the application of land under what is called re-certified scrip?

A. Well, these rights which have been certified by the Commissioner, when filed in the local office, permit the issuance of certificate of title and when no certificate has been made as to the validity of the right, the local officers are not allowed to issue the certificate. A reference is made to the Commissioner for his determination of the validity [101] of the right.

Q. Of the scrip? A. Yes, sir.

Q. Of the right. I see. Now, I will ask you if this is the reason that you are now unable to issue a certificate to Mr. Barron, is that the scrip isn't here in your office?

(Testimony of C. B. Walker.)

A. That and the possibility that the basis of the right there itself may be uncertified.

Q. Scrip? A. Scrip.

Q. I understand where certified scrip is used that is certified—what is it, by the Commissioner's office?

A. Yes, sir.

Q. Commissioner of the General Land Office. Then in that case when the proof has gone so far as the proof in this case and you have the proof here in that now, you would issue his final receiver's certificate? A. Yes, sir.

Q. If it is uncertified scrip, or in the condition this one is in, you would forward the papers back to the Commissioner's office to ascertain whether or not the scrip is good, or, as in this case, to find out whether or not the scrip he refers to in that assignment is in that office? A. Yes, sir.

Mr. WINN.—You may cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Mr. Walker, when was Mr. Barron's application first filed in the Land Office for this survey number 804-B?

A. August 30, 1911.

Q. That is the first application that you have in your office **[102]** of record of Mr. Barron's application for this survey number 804-B?

A. Yes, sir.

Q. It is the only application you have?

A. It is the only application; yes, sir.

Q. And there is no scrip, I understand, in this office at this time as a basis for this application?

(Testimony of C. B. Walker.)

The scrip itself isn't there?

A. Well, the assignment is part of the collection of proofs, that is termed by some persons scrip, and others as soldier's additional homestead rights. Now, part of that proof is here.

Q. But, you don't—what I want to get at is, you don't call that, Mr. Walker, actual soldier's homestead scrip, do you? It isn't, is it?

A. I don't use the term "scrip" at all, if you will permit me, but that is a portion of the evidence of the soldier's right which would be filed with this here and, of course, that is if all the proofs of the original right and its assignment through various persons to Mr. Barron were here, this is one of the assignments that would be presented.

Q. And if they were here in proper form, with the right as you call it—with all scrip and the assignments thereof were made—on file in your office, then you say you would issue a final certificate?

A. I would if—if the—if all these proofs had been certified to as evidence of the right to the given amount of acreage in Mr. Barron or rather in one of his assignors. The certificate might relate to the original soldier or to someone thereon subsequent to his assignment.

Q. And all you intend to do now, I understand, is to forward these papers to Washington; that is, you don't intend now [103] to issue final certificate at this time? A. No, sir.

Q. But you intend to forward the papers to the General Land Office at Washington? A. Yes.

Q. Now, Mr. Walker, you stated that should it be

(Testimony of C. B. Walker.)

found that there were—there was no scrip or right, as you call it, on file in the General Land Office at Washington, that other—that other—other scrip, unused scrip, recertified scrip might be accepted in lieu of this? A. Well, I have only—

Q. That is a matter which is left for the General Land Office. You don't state that—it wouldn't be your own action, that is, what I want to get at?

A. No; no.

Q. Whether or not they were going to do that would depend on the officer at Washington and not on yourself whether that was done?

A. Yes; it would be a matter for the Commissioner to settle.

Q. Yes; that was what I wanted.

Q. (By Mr. JENNINGS.) Mr. Walker, you have there the papers of all the steps taken by Mr. Barron towards his— A. Yes, sir.

Q. I wish you would tell what necessary—what steps have been taken, either by Mr. Barron or by Mr. Robertson. What is the date of the first step taken by either Mr. Robertson or Mr. Barron after the first day of March, 1911, the date of the assignment from Robertson to Barron? When did Barron take the next step, either Barron or Robertson? When was the next step taken in your office after that date?

A. So far as the record shows the first action of Mr. Barron towards securing title to the land was the filing of the [104] application on the 30th of August, 1911.

COURT.—Is that all, gentlemen?

(Testimony of C. B. Walker.)

Redirect Examination.

Q. (By Mr. WINN.) Now, wait,—I will ask you what time was the plat, which you have here, which is a copy of the certified plat which we have offered in evidence in this case and marked—just withdraw that question. I will ask you what date was the plat of U. S. Survey number 804, of which Plaintiff's Exhibit "A" in this case is a copy, filed in your office?

A. The plat or survey shows only the date June 17, 1909, which is the day following the date of the Surveyor-General's certificate and I have no doubt that the plat was received in the Land Office on that date and that is the—was intended for the filing date, although it was not signed by the Register.

Mr. CHENEY.—I object to that, if the Court please, and ask that it be stricken. Just simply stating it was intended to be the filing date—unless he was the man who actually received that plat; how it was put into his hands and what other officers—

Mr. WINN.—Well, now, he wants Mr. Walker to go to the extreme—going down to his office and find the exact date. I will recall Mr. Walker for that exact purpose.

Q. Can you state positively, after examining the records of your office, what time the plat was filed there, Mr. Walker?

A. No, sir; the information I would gather there I don't think would be any more than what I gather from the plat.

Q. (By the COURT.) Let me ask you, Mr. Walker, is it customary merely to give the date that such plats are filed in your office without adding the

(Testimony of C. B. Walker.)

certificate of the Register thereto? [105]

A. Generally, the plats are filed with a filing stamp and with the signature of one of the officers, but in some cases they haven't been filed in that way. This is one of them.

Q. You are certain though that is the date of the actual filing? A. Yes, sir.

COURT.—The objection may be overruled.

Mr. WINN.—Just a minute, your Honor. Mr. Dudley simply stated he put the date on there while he was Register and he can testify to it.

Q. Now, Mr. Walker, have you in these papers that you brought up, in your office, the deed from Robertson to Mr. Barron? A. Yes, sir.

Mr. WINN.—This is the paper. I forgot, your Honor, to offer this deed from Robertson to Barron. I didn't know it was in these papers until just now.

WITNESS.—You asked for the deed?

Mr. WINN.—Yes; from Robertson to—

WITNESS.—Only the abstract here.

Mr. WINN.—You say—I thought that the original deed was with these papers, your Honor, but it isn't. But we will offer the certified copy—better than the abstract of title.

Mr. CHENEY.—Was this here offered in evidence? Have you offered this in evidence?

Mr. WINN.—No; a certified copy already in.

Mr. CHENEY.—I want to object to it and have a chance to cross-examine Mr. Walker on that about this filing. I know that map wasn't filed in that office and I can prove it.

(Testimony of C. B. Walker.)

Mr. WINN.—Mr. Dudley is here and has got his filing mark on it.

Mr. CHENEY.—Wasn't marked filed to the present time.

Q. (By Mr. WINN.) Now, you were questioned by Mr. Cheney in regard to what the Commissioner of the General Land Office [106] does with respect to ascertaining the validity or invalidity of scrip or an assignment. I will ask you if it hasn't been the custom of that office, the General Land Office, if any uncertified scrip or assignments of this nature were found not to be good to notify the parties and give them opportunity to supply good scrip?

A. Yes; it has.

Q. It has never been made a ground of disallowing the application for patent, to your knowledge, has it, Mr. Walker?

A. I don't recall any case where an application has been filed and then rejected for failure to furnish valid rights.

Q. Yes, sir. The fact is that this uncertified scrip comes to you in such a questionable shape that you don't grant a final receiver's certificate and that is always left up to the Commissioner of the General Land Office from the records there to say whether that soldier was entitled to any number of acres of land, and the purpose issued, and so forth, of that nature? A. Yes, sir.

Q. Now, Mr. Cheney questioned you about the scrip. Now, this scrip, what is it? Is it not issued just the same way that a certificate of stock in a cor-

(Testimony of C. B. Walker.)

poration is issued, Mr. Walker; or is it or does it serve any different purpose than to make up the right of the party to take up land under it?

A. Well, the evidence of the right in a usual case are consulted, or, first, the evidence of the service of the soldier in the Civil War, also the evidence of his homestead entry prior to 1874 and then the assignments by himself, or his heirs, or administrators, or his estate, to other persons for given areas, or subsequent assignments by them to various persons and finally to the—to the man who uses the right. [107]

Q. Then, ordinarily—referring to plaintiff's—this assignment that has been offered in evidence in this case and marked Plaintiff's Exhibit "C"—is that considered part of the proof of the right that Mr. Barron might have to take up this land under that scrip? A. Yes, sir.

Q. And it simply informs you that there is a balance of scrip in the Land Office that has been left over from some other entry sufficient to cover this tract of land? A. Yes, sir.

Mr. WINN.—That is all.

Recross-examination.

Q. (By Mr. CHENEY.) Mr. Walker, do you claim that this little mark up in the corner of this plat is the—is the file-mark of your office—all plats that are filed there at the same time with an application for homestead entry of land—that little thing there constitutes a file-mark?

A. I don't claim that was filed in connection with this application.

(Testimony of C. B. Walker.)

Q. No; you don't claim that is a file-mark; just that stamp June 17, 1909?

A. Mr. Cheney, I have every reason to believe it was placed there for that purpose, and they might for some reason have overlooked the matter of formally signing it, verifying the date by the officer's signature.

Q. But your usual way is to mark it filed and you have a stamp that says "filed" and there is a place for the officers of the Land Office to sign?

A. Yes, sir.

Q. Yes. You will remember—I will just ask you —I don't [108] know whether you remember—about a year ago when this case was tried before, I came down to the Land Office and asked you and Mr. Mullen if anything filed in connection with this survey and Mr. Mullen told me nothing but a map that had been left there a year or two before, but never filed it because no scrip on file or no application on file? A. I don't recall no such circumstance.

Q. Were you here?

A. I think I would have remembered it if it had occurred.

Q. Were you here last March? A. No.

Q. I don't claim the conversation occurred with you. A. No; I wasn't here last March.

Q. I don't know whether you were here or not. What is it? A. I wasn't here in March.

Q. And you say— Well, isn't it the rule of your Land Office if anybody brings a map down there of any kind and they haven't presented any applica-

(Testimony of C. B. Walker.)

tion or any scrip there, you wouldn't file it as a document filed in your office until the application was produced?

A. In homestead cases—in cases of this kind, in fact in all homestead cases, the claimant does not file his individual map or survey. That is not a map. That is part of the records in this case. They are part of the proofs furnished by Mr. Barron, that is the—

Q. Oh, I see.

A. —that is the Government quadruplicate plat or survey.

Q. I see. It isn't part of the records in this case?

A. No, sir.

Mr. CHENEY.—Well, that is all then. [109]

Redirect Examination.

Q. (By Mr. WINN.) Well, now, let's get at that again, Mr. Walker. How does your office become possessed of these copies of the application—copies of the plats of the survey in any cases or application for title under this Act—Soldier's Additional Homestead Scrip?

A. That was sent to the office by the Surveyor-General.

Q. Yes, sir. A. And is kept on file.

Q. Well, what do you mean by this not being a part of the records? Is this a copy of the map that was sent to your office by the Surveyor-General?

A. It is the map itself.

Q. It is the map itself, that was sent there. Now, as I understand, Mr. Walker, that these surveys

(Testimony of C. B. Walker.)

occur, have to pass through the Surveyor-General's office there and have the examination there and so forth have to be made of them. After they get through it and the surveys approved, and so forth, and then the Surveyor-General forwards to your office—is it a triplicate—duplicate of it. So is it a copy of the plat as approved by the Surveyor-General? A. Yes, sir.

Q. They sent that down? A. Yes, sir.

Q. Did they send the field-notes with it?

A. No; the field-notes of the case belong—that is, one copy of them is given to the applicant and he files his field-notes.

Q. And then there is likewise a copy of it—a plat like this required to be posted on the claim, isn't there? A. Yes, sir.

Q. On the claim. And this plat you have testified concerning [110] came to your possession the way you have indicated?

A. I have every reason to believe it did. It is similar to other cases and invariably a plat dated in the Surveyor-General's office under his certificate on one day gets to our office on the next or subsequent day.

Q. Well, then this map is part of the record, though, in the matter of the application for patent taking all the papers together, isn't it?

A. Yes, sir.

Q. Part of the record? A. Yes, sir.

Mr. WINN.—That is all, your Honor. I would like, if it please the Court, if Mr. Walker could let this stay if he is going until Mr. Dudley was put upon

the stand and I will prove—want to prove this filing mark; prove unquestionably it was the date came into the office.

Mr. CHENEY.—No dispute on my part that that map was in the Land Office, but I claim it was never filed in the Land Office and isn't customary for them to file it until the production of the scrip.

Mr. JENNINGS.—That is just exactly what they have to prove. They don't have to produce their scrip.

Mr. CHENEY.—It was lying there for the last two years in the drawer in the office.

Mr. WINN.—If he is going to testify, probably knows more about it than the Land Officials. I don't know. If you will leave it there.

Mr. WALKER.—Well, in regard to this assignment, is that in shape so that I can take it with me?

Mr. WINN.—Well, Mr. Robertson wants to copy this in the record.

COURT.—Well, Mr. Walker wants to take it. No particular [111] hurry, are you? Mr. Robertson can copy it some other time. Call your next witness, gentlemen.

Mr. WINN.—Mr. Dudley. [112]

[Testimony of John W. Dudley, for Plaintiff.]

JOHN W. DUDLEY, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Mr. Dudley, you have just heard the testimony of Mr. Walker in this case. I will ask you if you had any connection with the appli-

(Testimony of John W. Dudley.)

cation of Mr. Barron in this case for patent to the property in question and—I don't mean your official connection—but whether or not you have been acting for him in the procurement of patent in this case?

A. I have been his attorney in fact; yes, sir.

Q. Yes; that was what I thought. Now, there has been some question, Mr. Dudley, about a file-mark on a plat which purports to cover the ground embraced in U. S. Nonmineral Survey Number 805?

Mr. BURTON.—804.

Q. (By Mr. WINN.) —804–A—of which Plaintiff's Exhibit "C"—Exhibit "A" is a copy, and there is some question about the notation June 17, 1909, which is stamped in the corner of the plat which Mr. Walker has just testified concerning as being a part of the record in this application for survey. I will ask you if you know anything about that file-mark?

Mr. CHENEY.—Object to that, if the Court please, for the reason that Mr. Walker, the Register of the Land Office, has stated that this particular map that has a little thing there that counsel is questioning about now is no part of the record of this case; that is, the case of James T. Barron as applicant for this survey number 804–B. Well, now, if that is no part of the record there—if already has his copy in evidence—that is in evidence—why it is certainly immaterial to put this in evidence. The only [113] object that counsel can possibly have in this thing is to attempt in some way to show that he initiated his proceedings for title before August 30, 1911. Now, Mr. Walker has sworn that he filed his application

(Testimony of John W. Dudley.)

there in 1911, August 30th. That was the first proceedings taken to obtain title for this land in the Juneau Land Office. What he had begun in this other office, or I say as soon as got his copy is, don't add anything to it and I want to object to it for that reason.

COURT.—No; the witness was Register at the time this document was applicable to be filed and can't do any harm, Mr. Cheney, to have it determined just when this paper was filed. You contend—

Mr. CHENEY.—That it was never filed.

COURT.—You contend it was never filed and you contend also the inception really dates from the filing of the application. Counsel contends the inception really dates from the survey and that can be determined on the final argument. Objection overruled.

Mr. CHENEY.—Exception.

WITNESS.—You wish me to answer?

Q. (By Mr. WINN.) Yes, sir.

A. I placed that file-mark there.

Q. In what capacity were you acting at the time that file-mark was placed there, Mr. *Walker*?

A. I was Register of the Juneau Land Office.

Q. You heard Mr. Walker's explanations of how these plats come to the Land Office, did you not, Mr. Dudley? A. Yes, sir.

Q. And that is—what have you to say about that?

A. I corroborate his statement entirely.

Q. Now, I will ask you, Mr. Dudley, if you have ever been out [**114**] to the ground that is embraced in this—in this U. S. Nonmineral Survey Number

(Testimony of John W. Dudley.)

804? A. I have.

Q. When were you first out there?

A. On August 19, 1911.

Q. On August 19, 1911? A. Yes, sir.

Q. What was the occasion of your making a trip out to this ground?

A. I was posting the notices of Mr. Barron's application for patent.

Q. What, if anything, in the way of a structure did you see built out in front of this property?

A. I saw a fish-trap in operation. At the time I was there there was some one—some boat there brilling the trap, I believe; at least there was a boat there in front of the trap.

Mr. WINN.—I have a plat here, if your Honor please, that I desire to have Mr. Robertson mark for identification at this time.

COURT.—May be identified.

Mr. WINN.—I will show it to you. Marked for identification Plaintiff's Exhibit "D."

COURT.—Want to cross-examine the witness with reference to this map, gentlemen.

Cross-examination.

Q. (By Mr. CHENEY.) You know that file-mark, Mr. Dudley,—I call it a file-mark.

Mr. WINN.—Let me get that question withdrawn then. I will withdraw my question and Mr. Cheney is to cross-examine the witness upon the file-mark upon the plat, which I have just questioned him about and which the record— **[115]**

(Testimony of John W. Dudley.)

Q. (By Mr. CHENEY.) Why do you call that a file-mark, Mr. Dudley?

A. In June of 1908, the year before the Department instructed our office as to a new method of filing papers and of marking the filing and they had changed the system of records in the General Land Office, at that time and from July 1, 1908, we were instructed to place a filing date in the upper corner of the left—upper left-hand corner of any paper filed, a serial number and receipt number being placed in the other, in the upper right-hand corner, before the papers were transmitted to Washington.

Q. So, if a paper was actually filed in your office you were instructed to put a date up in the corner?

A. Up in the upper left-hand corner.

Q. No file-mark on this map. You can see no place marked "filed" and signed by the officer of that Land Office?

A. No, sir; that file was *upt* there—that date was put there for the filing date under this instruction from the General Land Office.

Q. Well, but I understood you to say when you filed papers of any kind in your office, when actually filed and marked "filed," you also put this stamp up in the corner?

A. No; I said that was done when ready for transmittal to Washington, when the final entry—

Q. You mean to say that was all you put upon documents brought down there and you actually filed them, you or Mr. Mullen, was that your custom or

(Testimony of John W. Dudley.)

was it your custom to put a stamp that says "f-i-l-e-d" on it?

A. No, sir; it was not our custom to put that stamp on after that date of July 1, 1908, with the word "filed" on it.

Q. You mean to say now that documents of this kind brought down there and have been filed with an application for patent, that haven't got the file-mark "filed" and date and then signed? **[116]**

A. Yes, sir.

Q. That just simply stand like that?

A. Yes, sir.

Q. You want to swear to that? A. Yes, sir.

Q. That all they have is this little mark up there?

A. May have been papers changed from the old system to the new and had a file-mark after they were folded on the outside, a file-mark, and then they were changed to the new system. All we did was to put the date in the upper left-hand corner.

Q. This map then is simply a quadruplicate or duplicate, or something, of a map certified to by General Distin as Surveyor-General? A. That is true.

Q. And left down there in the Land Office and was in the drawer, one of those lower drawers there, and laid there since 1909? A. Filed there.

Q. Nothing ever done there?

A. Until after approved Survey Number 804.

Q. No application filed?

A. No, sir; nothing of that kind.

Q. Until the date Mr. Walker just testified?

A. No, sir.

(Testimony of John W. Dudley.)

Q. (By Mr. JENNINGS.) You don't know it was?

Mr. WINN.—I don't care if both want to cross-examine—

Q. (By Mr. JENNINGS.) Nothing to show what it was to put that to; no application with it; no nothing; just a map? A. Just a map.

Q. Just a map came to your office and you put that away there; laid it away in the drawer and that was all was done? A. Yes, sir. **[117]**

Q. (By Mr. CHENEY.) Mr. Mullen was there in the Land Office at that time? A. At that time.

Q. He was there last March? A. Yes, sir.

Q. He was there all during the month of March when this case was tried a year ago?

A. I believe so; yes, sir.

Mr. CHENEY.—That is all.

COURT.—Any further use with this map, gentlemen?

Redirect Examination.

Q. (By Mr. WINN.) Yes, sir. I will ask you if this manner of putting this mark on this map was the general rule that was followed in the office and as indicated by your testimony, Mr. Dudley?

A. From July 1, 1908, on, and I don't know whether those instructions have been changed or modified since.

Q. And the instruction requested that these maps should be sent to your office down there after the Surveyor-General has got through with them and been approved there, doesn't it? A. Yes, sir.

Q. And these maps came in there just the same

(Testimony of John W. Dudley.)

as all other maps under like applications come in?

A. Yes, sir.

Mr. JENNINGS.—Just a moment. This map there you are talking about Mr. Walker is taking it away now.

Mr. WINN.—There is a certified copy of it.

Mr. JENNINGS.—That certified copy hasn't got the date up here in the corner.

Mr. WINN.—We will ask at this time, while the witness is on the witness-stand, to be permitted to place on the certified copy, which has been offered in evidence in this case [118] and marked Exhibit "A" the file-mark, which has just been marked "B," and so this will be a complete copy.

Mr. CHENEY.—If the Court please, that isn't competent. He is introducing testimony—that was introduced in evidence and is from the Surveyor-General's office.

COURT.—Evidently isn't a copy.

Mr. CHENEY.—Could they add anything more to the case to say of this—this is certified by General Distin and that is certified by General Distin.

COURT.—This isn't complete until it has every word contained in the other.

Mr. CHENEY.—Well, but this comes from General Distin's office, I understand. How could introducing that make it any different?

COURT.—Well, I suppose the reason, so long as the other was never in the Land Office and this was in the Land Office and the date of its receipt from

(Testimony of John W. Dudley.)

the Surveyor-General's office is indicated by the file-mark.

Mr. JENNINGS.—You want to introduce here a certified copy of the map that was filed in the Land Office. You don't care about anything—certified copy from General Distin's office.

Mr. WINN.—Why, they are the same thing.

Mr. JENNINGS.—Same thing except that date.

Mr. WINN.—This is a certified copy of it, except the date, of the original.

Q. What are these originals or duplicates?

A. No; the original is on file in General Distin's office. These are all duplicate copies.

Q. That is what they are?

A. And they are certified to as copies.

Mr. WINN.—I simply want to take the copy which we have offered in evidence, if the Court please, to shorten the record, to have added to there the words "June 17, 1909," [119] being the date both Mr. Walker and Mr. Dudley have testified concerning and then I have a complete copy after they examine or cross-examine the witness about.

COURT.—Very well, it may be done, but I don't see the necessity of it because the witness has already testified that is a copy of the map you have in evidence. Was filed in his office on—

WITNESS.—June 17, 1909.

COURT.— —so I don't see the necessity of it.

Mr. WINN.—Counsel makes some objection, I thought would overcome. I will withdraw the offer.

COURT.—I don't think it is necessary.

(Testimony of John W. Dudley.)

Q. (By Mr. WINN.) Now, Mr. Dudley, I will ask you concerning a certificate which has been offered in evidence in this case,—an assignment; purports to be an assignment made by Anna Dunne?

COURT.—Are you now through with this map?

Mr. WINN.—But this is one of his originals. I want to get through with these before I can get to the other plats.

Q. I will ask you if you have seen that certificate, assignment, before? A. Yes, sir.

Q. Now, you was Register of the Land Office here for three or four years, weren't you, Mr. Dudley?

A. Yes, sir.

Q. You heard Mr. Walker's testimony concerning the use of assignments of this kind for the purpose of obtaining title to land, did you not?

A. Yes, sir.

Q. Now, I will ask you, Mr. Dudley, what, from your own knowledge of the practice of the General Land Office, both as being Register of the local land office and practice you have had **[120]** before the land office since, as in regard to certificates of this—like that—if you had anything to do with any of them, either in the practice of an official or as a practitioner?

A. Well, Mr. Walker has probably stated all the points in regard to them, as I understand.

Q. Well, now?

A. Such an assignment as that is a part of the proof of the soldier's right and, as stated in the heading of this paper, the remainder of this proof exists

(Testimony of John W. Dudley.)
in other portions of the General Land Office.

Q. And that also would appear in the Commissioner's office at Washington, would it not?

A. In all probability; yes, sir.

Q. Now, suppose, Mr. Walker, in the case of uncertified scrip or in the case of scrip for that *suppose* is invalid; that is, the proof or the right of the soldier to have issued to him scrip turns out to be invalid after the acceptance of an application for patent from this office to the Commissioner's office—what has been the practice and the custom or actions taken by the Land Office at Washington in such cases?

A. A letter is written to the local land office, directing them to issue notice to the applicant that so many days will be allowed in which he may substitute a valid soldier's right for the one which has been found imperfect.

Mr. WINN.—Do you want to question him about this paper any, Mr. Jennings, or—it is the original and Mr. Walker is waiting here, if you want to cross-examine?

Mr. JENNINGS.—Going to copy that in the record?

Mr. WINN.—Yes. Well, then, if not, I suppose Mr. Walker can take it. [121]

Mr. JENNINGS.—Judge, if you say you are going to copy it, if Mr. Walker is going to take it away—

Mr. WINN.—Why, the Reporter is going down there to copy it.

COURT.—Yes.

(Testimony of John W. Dudley.)

Q. (By Mr. WINN.) Now, I will show you a map or plat which purports to be a copy of some map or plat of U. S. Nonmineral Survey 804 and I will ask you if you have ever seen this paper before?

A. Yes, sir.

Mr. WINN.—Now, I will have it marked for identification. I don't want to offer it, because I will put Mr. Hill on the stand. He drew it.

Mr. CHENEY.—Is that the same one in evidence at the other trial?

Mr. WINN.—No; it is a new one. Have it marked for identification. That is it is a copy of some of the maps offered heretofore, except some additional data put to it.

COURT.—It may be identified, Judge, and then they can raise whatever objections they desire when you offer it.

Mr. JENNINGS.—I don't know *as has* been identified. The witness simply said he has seen it. Identified for what?

COURT.—I presume he desires to ask the witness with reference to it and have it marked as some particular exhibit for identification; subsequently identify it sufficiently by the man who made it; then offer it in evidence.

Mr. WINN.—Yes, sir; this is a little out of order I confess, but Mr. Dudley wants to get away. He is moving and I didn't want to keep him hanging around and didn't want him to stay.

(Plaintiff's Exhibit "D," marked for identification.)

(Testimony of John W. Dudley.)

Q. I will ask you, Mr. Dudley if, when you were out to the ground embraced in U. S. Survey Number 804, in July or [122] August, last, if you observed the construction of a fish-trap that is all in front of this land? A. I did.

Q. Was that the first time you had been upon these premises?

A. The first time I had been upon that survey; yes, sir.

Q. Now, I will refer you to this map and plat, which has been identified by you and marked Plaintiff's Exhibit "D" for identification, and ask you if the trap which was constructed there was in any manner constructed according to the drawing that is made upon this map and plat?

Mr. JENNINGS.—I object, if the Court please, no foundation laid for that—

WITNESS.—So far as I can see.

Mr. JENNINGS.— —put a man on there and ask him if a fish-trap is constructed according to a certain map made by a surveyor when there is no evidence—

Mr. WINN.—Well, I suppose, if your Honor please, I had better call Mr. Hill on, unless your Honor will permit.

COURT.—No; with this map shown, the witness was on the ground—he may testify the same as anybody else whether this illustrates conditions there. He may answer.

A. This map appears to show the trap as it was located and about the position that I should judge

(Testimony of John W. Dudley.)

it occupies on the ground.

Q. (By Mr. WINN.) Now, I will ask you, Mr. Dudley, when you were out there at this time if you noticed as to whether or not the lead from the pot and fillers and heart of the trap that was being fished upon the ground extended out to high-tide mark, low-tide mark, or the upland, and how far it did extend?

A. When I was upon the ground the piles did not extend—

Mr. CHENEY.—Just a moment. We want to object to that as immaterial [123] because in August, 1911.

COURT.—Objection may be overruled.

A. When I was upon the ground the piles did not extend up to the low-water mark. I should judge it was about half tide when I was there, if I remember rightly, and there was some distance of water between the piling and the shore, but there was a cable stretched up to where, I should imagine, was the high-water mark and that was supported by a cross or shear, leading over this and anchored above it to some point apparently on the upland.

Q. What was there hung on this cable?

A. There was some cable such as used in the trap.

Q. Part of the lead of the trap?

A. Part of the lead of the trap, I should judge; yes, sir.

Q. Now, let me see if I understand you. I understand there was a cable that ran from the last pile in the lead of the trap out to this structure you say was up about high-tide mark? A. Yes, sir.

(Testimony of John W. Dudley.)

Q. And then on that cable from the last pile was strung web which finished out the lead of the trap?

A. Yes, sir.

Q. Now, how far, Mr. Dudley, in your judgment, was the last pile in the lead of that trap from the line of ordinary low tide, that is, I suppose, it is estimated?

Mr. CHENEY.—Object, if the Court please, because the witness has stated that he didn't know; he thought it was about half tide. I don't think it would be competent testimony.

COURT.—He may answer. He may give his testimony.

A. I couldn't say as to just how far it was to the low-tide mark from the last pile.

Q. (By Mr. WINN.) Oh, I see.

A. I should judge it was more than one hundred feet. [124]

Q. You wasn't there at low tide?

A. No, sir; I was not.

Q. Well, about—I will ask you this question: About what was the distance between the last pile that was in the lead to this structure that was on the upland or above ordinary high tide upon which the cable was stretched and there was some web hung—about what was the distance, can you say?

A. Well, it was somewhere in the neighborhood of 200 feet, I should say.

Q. Now, I will ask you as to whether or not this web that was hung on there taken in connection with the web that was hung on the piles from that point

(Testimony of John W. Dudley.)

on to the heart and filler of the trap constituted one continuous line of lead?

A. It appeared to be continuous.

Q. Now, I will ask you if you made any examination of this ground embraced in U. S. Survey Number 804 when you were there at this time so as to ascertain the corner posts of it? A. Yes, sir.

Q. Well, now?

A. I went to corner No. 2 and identified it before I posted the notice on the claim.

Q. Well, did—that was the only corner you looked for?

A. Yes; that was the only corner we looked for.

Q. What are the two corners mentioned along there that mark the meander of the line along the shore?

A. Is it 1 and 2?

Q. Well, what is it?

A. It is marked here 1 and 3, but that is an error. It should be corner No. 2 at the southwest corner of the survey. Here is corner No. 3. Just simply transposed those figures.

Q. I see. Now, I will refer you to the other certified copy, Plaintiff's Exhibit "A," and ask you to designate on that what [125] corner you discovered or posted your notice?

A. I began at corner No. 2, at the southwest—southeast corner of the survey and identified the mark on the rock and then we went northwest from that upon the upland and posted notices.

Q. Now, I will ask you—

Q. (By Mr. CHENEY.) Are you talking about

(Testimony of John W. Dudley.)

August or later? A. August, 19, 1909.

Q. August 19th.

Q. (By Mr. WINN.) 1909? A. 1911.

Q. I will ask you then, Mr. Dudley, referring to this Plaintiff's Exhibit "D" for identification, now, after you have located the corner of the claim that you have just referred to, as to how that trap was constructed, in your judgment, with respect to the way it is indicated on this exhibit for identification?

A. Apparently was constructed immediately in front of this survey.

Q. Well, in your judgment, how would you say it was constructed with reference to the drawing on this Plaintiff's Exhibit "D" for identification relative to the position?

Mr. JENNINGS.—Now, if the Court please, that simply is an attempt to have two witnesses swear as to how the trap looked; if it is correctly represented on the map. I think he has got a surveyor who went out there and is going to testify from courses and distances and now he is asking this witness, who so far as this case is concerned is unexpert at all—just submitted a map to him that purports to be made from an actual survey and asks him if that is about right. That is just what that testimony amounts to.

COURT.—Well, if that, as counsel stated here, is made from an actual survey, and it is perfectly competent to have [126] a half a dozen witnesses testify as to whether or not a certain picture or a drawing by any man portrays a certain state of facts.

Mr. JENNINGS.—That isn't a picture. Sup-

(Testimony of John W. Dudley.)

posed to be a map.

COURT.—That is true. Probably, is a map, but the same rule of evidence would apply which would justify a man describing whether a certain drawing was a picture, a correct picture of a house or whether or not this, by the lines indicated, correctly portrays or substantially portrays conditions as they exist on the ground. Of course, if it could be shown that the surveyor had every mark that is now on that map, was made by an actual survey and set—or every post indicated on there to have been placed there after an actual survey with reference to that specific thing was concerned, why, of course, wouldn't be any necessity for any other witnesses, but that isn't the case here.

Mr. JENNINGS.—Well, if the Court please, I don't think that was confined to whether they looked like a picture of the trap. The question was, as I remember it, whether that was a correct representation of—just read the question.

Q. (By Mr. WINN.) I will ask the question—how would you say with relation—you saw that trap upon the ground when you were out there—with respect to the ground on this survey—was it constructed with respect to the way it is indicated on this map and plat which you hold in your hand?

A. I believe that this map correctly represents the location of the trap as I saw it then.

Q. (By Mr. CHENEY.) Could I look at it a moment, Mr. Dudley?

A. Yes.

(Testimony of John W. Dudley.)

Q. (By Mr. WINN.) This is the only time, I believe, you have ever been out to the ground, Mr. Dudley?

A. I was out there in November following, in 1911. [127]

Q. Did you take any notice of this trap then?

A. Yes.

Q. They weren't fishing it then?

A. They were not fishing at that time; no.

Q. How—do you remember there was just as many piles standing there in the lead—I don't refer to the heart, but in the lead—when you were there in November do you know or not? Did you take any notice of that?

A. I didn't notice particularly about that; no, sir; it was rather stormy and we made a hurried visit there to take the notice down.

Q. I believe you said you posted the notice and plat upon the property, and what was the occasion of your trip back there in November?

A. It was to see that the plat and notice had remained posted during the period of publication.

Q. So, could make the necessary affidavit?

A. So, to make the affidavit; yes, sir.

Mr. WINN.—I see. That is all, your Honor.

COURT.—Cross-examine.

Recross-examination.

Q. (By Mr. CHENEY.) Mr. Dudley, you are the attorney for Mr. Barron in the—in the application for patent for the homestead survey number 804–B?

A. Yes, sir.

(Testimony of John W. Dudley.)

Q. You have been tending to that matter?

A. Yes, sir.

Q. You say you were there on August 11, 1911?

A. August 19th.

Q. August 19th? A. 1911. [128]

Q. Do you remember what time of the day it was when you observed the conditions of the water there around that trap?

A. I think it was in the morning.

Q. What time of the day?

A. Well, pretty close to noon. I don't remember just now the time.

Q. Well, as near as you can put it, Mr. Dudley?

A. Well, say eleven o'clock.

Q. About eleven o'clock in the forenoon on the 19th? A. I think so; that is my recollection.

Q. You didn't measure the water? A. Oh, no.

Q. You are just testifying from your observation of the trap and the shore line, and so forth generally, as it occurred to you at that day—appeared to you on that day? A. Yes, sir.

Q. You were there for some purpose in connection with the—with the survey that—

A. I was posting the notice of Mr. Barron's application.

Q. Yes. A. Notice and plat.

Q. Well, there wasn't any survey made that day when you were there nor any water measured? You wasn't there for that purpose? A. No, sir.

Q. You were just looking at a map now, made by Mr. Hill and you say it appears to you to correctly

(Testimony of John W. Dudley.)

represent the condition of the trap and the shore line and the survey there as it appeared to you on that day? A. Yes, sir.

Q. (By Mr. JENNINGS.) You know nothing about the angles and the distances at all on this map? [129] A. No, sir.

COURT.—Any further redirect examination, gentlemen?

Mr. WINN.—That is all.

COURT.—That is all, Mr. Dudley. Call your next witness.

Mr. WINN.—Call Judge Winn. [130]

[Testimony of G. C. Winn, for Plaintiff.]

G. C. WINN, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) You are the United States Commissioner for Juneau Precinct and also ex-officio Recorder of that precinct, are you, Grover?

A. I am.

Q. You have—what is the volume?

A. Volume 23 of deeds.

Q. You have volume 23 of deeds there. Is that a part of the official record of deeds, and so forth, in your office? A. It is.

Q. Have you any deed recorded in that book purporting to convey ground, and so forth, from V. A. Robertson to James T. Barron? A. I have.

Q. I wish you would just open the book and let me identify that. Included on that page? A. Yes.

Mr. WINN.—We now offer in evidence, if it please

the Court, and request that the stenographer copy it in the record an instrument that—which bears date of the 8th day of March, 1911, from V. A. Robertson to James T. Barron, which covers the ground embraced in United States nonmineral survey number 804.

COURT.—What does the instrument purport to be—a deed?

Mr. WINN.—Didn't I say a deed? Purports to be a quitclaim deed from Mr. Robertson to Mr. Barron.

COURT.—Any objection.

Mr. JENNINGS.—Just a moment, your Honor, until I see what it is. [131] We object to the introduction of this deed, if the Court please, on the ground that it purports to convey a soldier's additional homestead claim situated on Chatham Straits, about three miles south of Funter Bay, and no foundation laid, no evidence at all, no evidence so far now to the effect that Robertson, the grantor of the deed, was the owner of the property attempted to be conveyed. The deed also attempts to convey a certain fish-trap site fronting said soldier's additional homestead of V. A. Robertson. No evidence introduced so far to the effect or tending to show that V. A. Robertson owned any fish-trap site which is covered by the deed.

Mr. WINN.—So far as the fish-trap site is concerned: I understand your Honor, that depends upon the proof. The deed is there that conveys the ground embraced in United States nonmineral survey number 805—

Mr. BURTON.—804.

Mr. WINN.— —804 from Robertson to Barron. The proof already shows that this survey was first made in the name of Mr. Robertson and was afterwards transferred to Mr. Barron.

COURT.—It may be received in evidence. Objection overruled.

[Plaintiff's Exhibit "F."]

"Barron v. Alexander, Plaintiff's Exhibit 'F.' Received in evidence—R. E. R.

KNOW ALL MEN BY THESE PRESENTS, That I, V. A. Robertson, a single man, of the city of Seattle, County of King, State of Washington, in consideration of the sum of One thousand Dollars ($1000), to me paid by James T. Barron, have bargained and sold and by these presents do grant, bargain, sell and convey unto the said James T. Barron, his heirs and assigns, all of the following bounded and described real property, situate in the District of Alaska, to wit: [132] That certain soldiers' Additional Homestead Claim of V. A. Robertson, situate on Chatham Strait, about two (2) miles south of Funter Bay, on the shores of Admiralty Island, designated on the plat of survey of the same as U. S. Survey #804, as laid out and surveyed by C. E. Davidson, U. S. Deputy Surveyor, October 31 and November 1st, 1908, more particularly described in said plat of survey.

Also that certain fish trap site fronting said Soldiers' Additional Homestead of V. A. Robertson, above described, and heretofore located by the Alaska Packers Association, a corporation of the State of

California, situated on the west coast of Admiralty Island in Chatham Strait, at a point between Funter Bay and Hawk Inlet, which said trap was operated by said corporation in 1908, and was thereafter on the 8th day of March, 1911, sold and conveyed to the said James T. Barron, and described in the deed of conveyance to said Barron as situated 'at a point between Funter Bay and Hawk Inlet, about four (4) miles distant in a southerly direction from said Funter Bay,' together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all my estate, right, title and interest in and to the same.

TO HAVE AND TO HOLD the above described and granted premises unto the said James T. Barron, his heirs and assigns forever.

IN WITNESS WHEREOF, I the grantor above named, have hereunto set my hand and seal this 8th day of March, 1911.

V. A. ROBERTSON. Seal.

Signed, sealed and delivered in presence of us as witnesses.

WILLIAM STEWART.
W. REID. [133]

State of Washington,
County of King,—ss.

BE IT REMEMBERED, That on this 8th day of March, A. D. 1911, before me, the undersigned, a notary public in and for said County and State, personally appeared the within named V. A. Robertson, who is known to me to be the identical person described in and who executed the within instrument

(Testimony of G. C. Winn.)

and acknowledged to me that he executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I have hereunto set my hand and notarial seal the day and year last above written.

N. P. Seal. FRANK I. CURTIS,

Notary Public in and for the State of Washington, residing at Seattle.

Filed 9:45 A. M. Oct. 5, 1911, Book 23 Deeds, page 48.

G. C. WINN, Recorder."

Q. (By Mr. WINN.) The page—is on page 48 of volume 23? A. 23.

Q. 23.

Mr. CHENEY.—I suppose, your Honor, it is understand that isn't offered as any right of fishery there on the part of Mr. Barron. Want this on the record in this case, and in the last trial they didn't rely on any right of fishery there.

COURT.—I can't tell the extent of the purpose—of the offer in reference to that at this time, but if it later develops that the grantor had nothing to convey why the instrument can't do any harm.

Mr. CHENEY.—The deed was introduced on the last trial. Your deed was in evidence.

Mr. BURTON.—It was offered and withdrawn for the purpose of completing our proof in the Land Office.

Mr. CHENEY.—I knew it was offered. [134]

Mr. WINN.—That is all, Grover.

Mr. CHENEY.—That is all.

COURT.—Next witness, gentlemen.

(Testimony of Lloyd G. Hill.)

Mr. WINN.—Call Mr. Hill.

COURT.—Is Mr. Hill in the courtroom? [135]

[Testimony of Lloyd G. Hill, for Plaintiff.]

LLOYD G. HILL, being duly called and sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

Q. (By Mr. WINN.) Your name is Lloyd G. Hill? A. Yes, sir.

Q. Mr. Hill, you were a witness, I believe, in this case when a hearing was had upon an application by the defendant to dissolve a temporary restraining order which had been granted in this case, were you not? A. I was; yes, sir.

Q. Now, prior to that time that—that you were called as a witness here for that, had you ever been on the ground embraced in U. S. Nonmineral Survey Number 805?

COURT.—804.

Q. (By Mr. WINN.) 804-A?

A. Yes, sir; prior to making that map I was over there on that claim.

Q. I will ask you if at that time, Mr. Hill, and while you were a witness upon the witness-stand upon the hearing to dissolve the temporary restraining order, if you identified what is called Plaintiff's Exhibit "C" that was offered in evidence in that case?

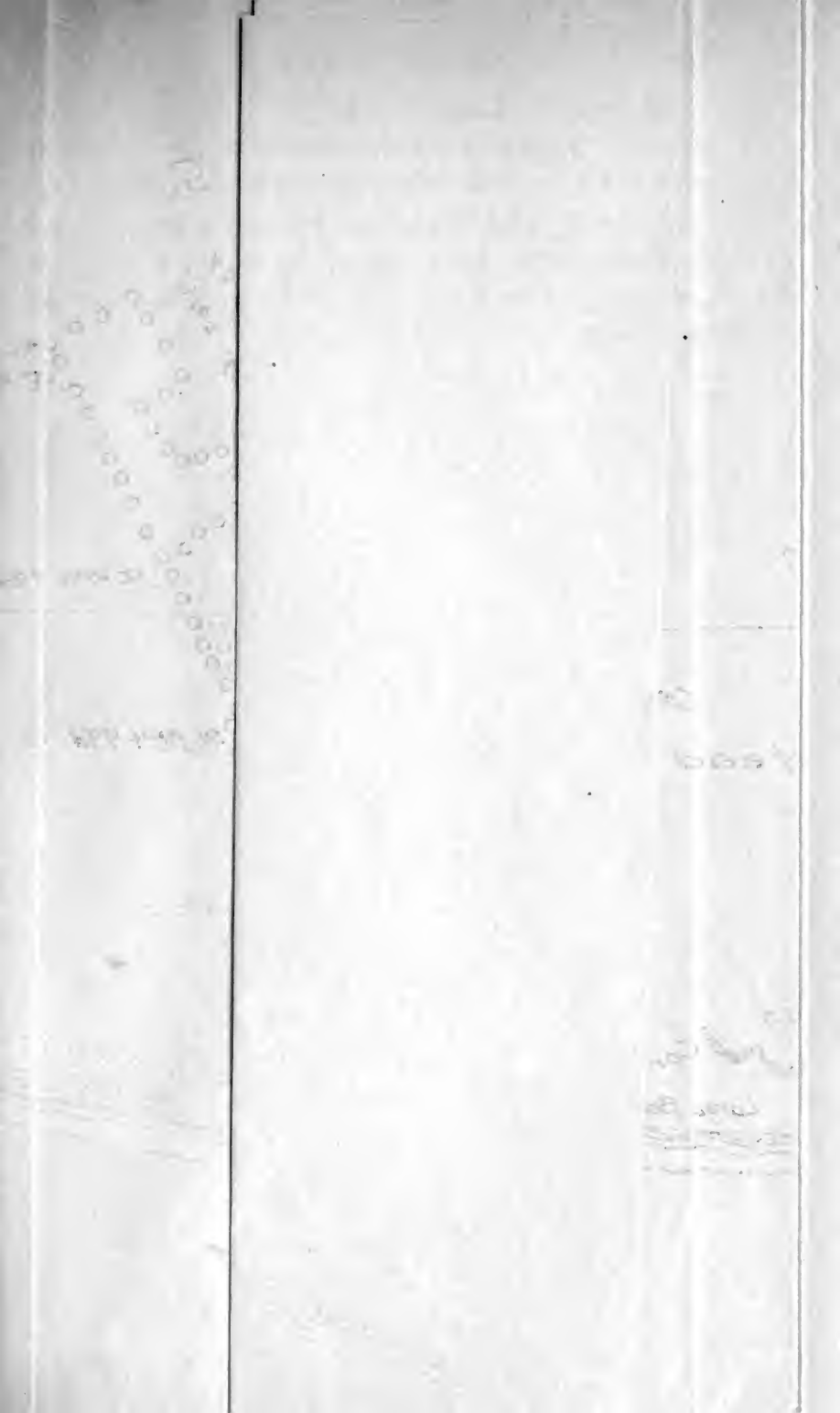
A. Yes, sir; I did.

Q. From what data, Mr. Hill, did you prepare that map and plat now which you have in your hand?

A. I prepared that from an actual survey of the

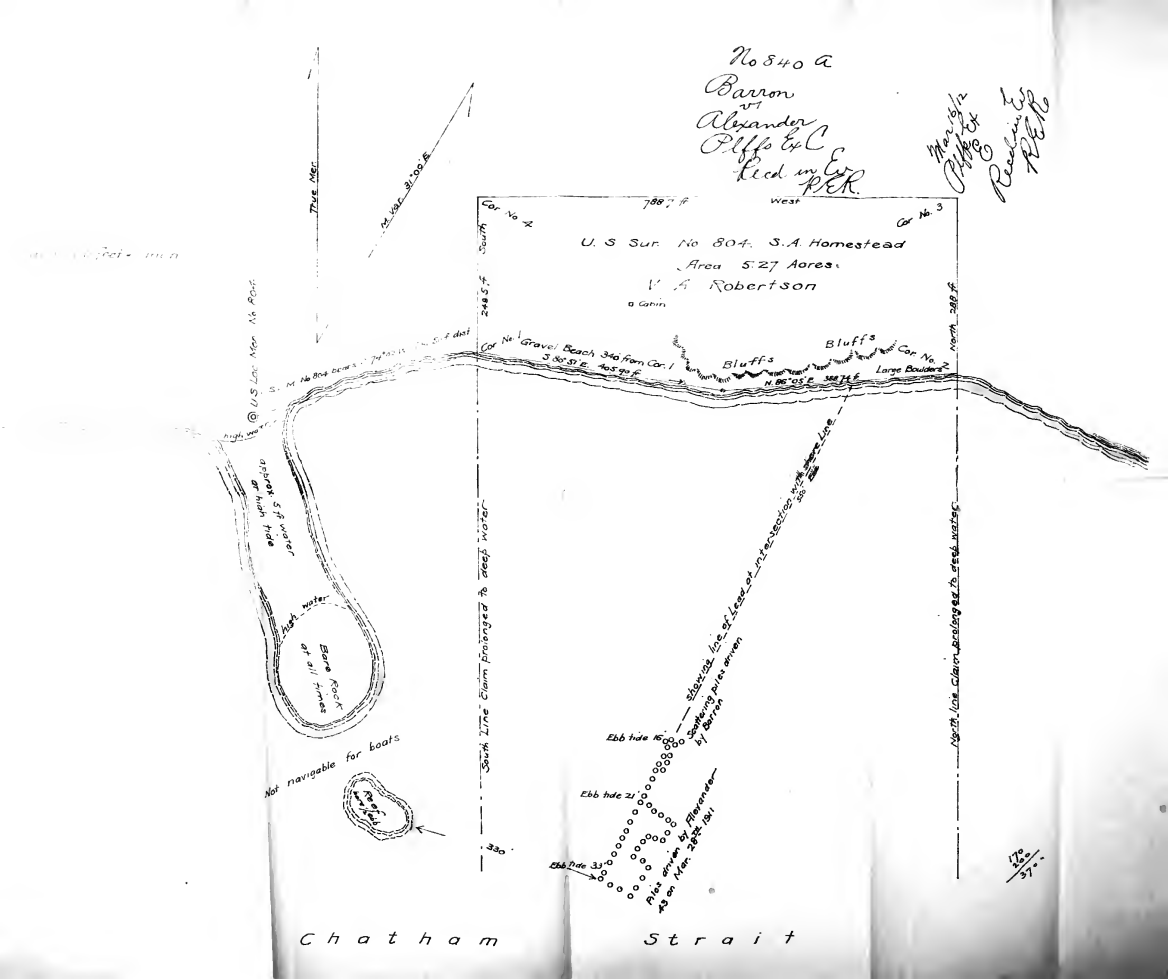
(Testimony of Lloyd G. Hill.)

ground. I determined the corners of the claim and collected the angles of the lead and located the position of nearly all the piles. Some was rather hard to determine the boat—out of the boat, but the piles extending towards the shore—the piles nearest the shore were determined accurately. [136]



(Testimony of Lloyd G. Hill.)

ground. I determined the corners of the claim and collected the angles of the lead and located the position of nearly all the piles. Some was rather hard to determine the boat—out of the boat, but the piles extending towards the shore—the piles nearest the shore were determined accurately. **[136]**


No 840 a
Barron
vs
Alexander
Pltffs Exh C
Recd in Evd
R.E.K.
Mar 9/12
Pltffs Exh
Recd in Evd
R.E.K.
Mag. Var.
N. Mag. S. 30° E.
788.7 ft
West
Cor. No. 4
Cor. No. 3
South
248.5 ft
North 288 ft.
U. S. Sur. No 804. S.A. Homestead
Area 5.27 Acres.
V. A. Robertson
a Cabin
U.S. Loc. Mon. No Post
S. M. No Post bears S. 30° E. dist
Cor. No. 1
Gravel Beach 340 from Cor. 1
S 56° 51' E. 405 ft.
Bluffs
Bluffs
Cor. No. 2
Large Boulder
N. 86° 05' E. 188.7 ft.
high water
approx 5 ft water at high tide
Just water
Bare Rock at all times
Not navigable for boats
Rock awash at high tide
South Line Claim Prolonged to deep water
Projected line of lead at intersection with South Line
Ebb tide 16:00
Sounding piles driven by Barron
Ebb tide 21:00
Ebb tide 3:30
Piles driven by Alexander 23 on Mar. 28th 1911
North line Claim prolonged to deep water
330
Chatham Strait
179
97

(Testimony of Lloyd G. Hill.)

Q. Well, I will ask you more in detail about that. I simply wanted you to identify the map.

Now, since he has identified it, your Honor, I offer it in evidence in this case.

COURT.—Any objection?

Mr. CHENEY.—This is the same map offered on the other hearing?

COURT.—Yes, sir.

Mr. CHENEY.—Oh, I guess we have no objection.

COURT.—May be received and marked.

(Marked Plaintiff's Exhibit "E.")

Q. (By Mr. WINN.) Now, Mr. Hill, I will ask you if you were on the ground or water in front of U. S. Survey 804 in order to get the data for the placing on this map and plat the structure there, that is called fish-trap, lead, and so forth? A. I was.

Q. What date did you go upon the ground to obtain that data? A. I think it was March 28, 1911.

Q. Well, what time was that with respect to the hearing had in this court upon the motion to dissolve the temporary restraining order?

A. Well, that was before, I think; yes, that was before.

Q. Well, you testified in that case and introduced this map and must have been before? A. Yes, sir.

Q. Well, now, what means did you use in ascertaining the manner in which that trap was constructed, the length of its lead from the pot and filler (spiller), and so forth, at that time?

A. I had a transit, chain, tape-line, and made an actual survey of it.

(Testimony of Lloyd G. Hill.)

Q. Who assisted you in that?

A. Why, I think I had some of the men from the cannery and some of the men on the "Anna Barron" to help me. [138]

Q. Anybody here as a witness with you?

A. No, sir.

Q. No one here that was with you at that time. Did you see Mr. Alexander out there at that time?

A. No, sir; I don't think I did.

Q. Well, was there anybody doing any work on this fish-trap when you were there?

A. No; it seems to be my recollection is no person there at all.

Q. Do you recollect any pile-driver?

A. No, sir.

Q. No boat; no pile-driver, there; no one?

A. No, sir.

Q. Now, the piles you have indicated upon this map and plat as being driven, a part of which constitutes and is the lead that was on the trap at that time and a part of which went there to make up the heart and the pot and the spiller of the trap,—did you ascertain the exact number that was there?

A. I counted the number of piles driven at that date; yes, sir.

Q. And what was the number?

A. Forty-three on March 28, 1911.

Q. Did you ascertain the length of the lead of this trap in from the pot and spiller? A. Yes, sir.

Q. Now, I will just ask you to take your map and plat and state to the Court what was the length of

(Testimony of Lloyd G. Hill.)

that lead from the—it is on a rectangular figure made by the driving of the piles up to the end of the lead?

A. I will have to scale it. Will be within—

Q. What I mean—from the word on this exhibit that is marked "ebb tide 21," from that pile then on towards the shore to the end of the lead,—what is the distance?

A. I make that distance to be 110 feet, that is, extending from [139] the point marked "ebb tide" towards the high land, towards the beach.

Q. Yes. Towards the land, that is marked U. S. Survey No. 804? A. Yes, sir.

Q. Now, what was the entire length of the trap, that is over all, including lead and the triangular figure there, that may represent the pot and spiller, and other parts of the trap?

A. The entire length at that time was about 250 feet.

COURT.—What was the last question? I didn't get it.

Mr. WINN.—That was the entire length of the trap, your Honor, from here clear up to there as driven at that time.

Q. Now, you have placed on this map other objects; one of which is called a "reef" and another is called "bare rock at all times" and the land peninsula. Looking past there something extending out from the upland. What is this to the westward—to the westward? A. Southward.

Q. Southerly? A. Southerly or westerly.

Q. Southerly or westerly, from the land embraced

(Testimony of Lloyd G. Hill.)

in survey 804. I will ask you to just explain to the Court what those objects are and how you ascertained the relative distance of those objects as from the fish-trap constructed at that date? Just explain that to the Court?

A. I simply meandered the beach and located them by traverse; ran along the beach; and I also, of course, traversed the land directly in front of survey 804 and located the position of the reef by angles and measurements.

Q. Now, I will ask you as to whether or not they are correctly indicated upon this map as they are upon the ground from your measurements and calculations that you made? [140]

A. I think so; yes, sir.

Q. Then, is this map that you have there drawn according to a scale? A. Yes, sir.

Q. What scale placed on there?

A. The scale is 100 feet to the inch.

Q. Well, then any one could take a scale and ascertain the distance between the various objects that is indicated on there? A. Yes, sir; very closely.

Q. Do you remember the distance, Mr. Hill, without measuring from a line extended—from the extension—what is this? A. That is west.

Q. Say, the westerly boundary line of survey 804 as extended on a straight line out on into the water. How far would that line be from the closest pile of this structure called the fish-trap?

A. At that time, I think, 200 feet.

Q. Well, how far would it be from the other side

(Testimony of Lloyd G. Hill.)

line of survey 804, extended in a straight line on down into deep water, as indicated on this plat?

A. That would be—you are talking now about the prolongation of the east line?

Q. Yes.

A. The difference between that line and the side of the trap?

Q. Yes.

A. Well, that would be—the nearest pile would be about 460 feet.

Q. What, Mr. Hill, just without measurements, so we will have it before the Court, is the length of the entire side line, the lower side line of this survey—I mean take it on a straight line, approximately, along the waterfront—what water frontage is there to that survey? **[141]**

A. Well, there is about 800 feet, very closely.

Q. You mean in a straight line across or following the meander?

A. Following the meander would be about 800 feet.

Q. So; but I was talking about a straight line across? A. Straight line would be 788.7 feet.

Q. And the meander would be as you indicated?

A. Yes, sir.

Q. Did you make any soundings at the time you were out here on this fish-trap?

A. I did; yes, sir.

Q. State to the Court what soundings you made at that time and indicate them on this map and plat.

A. I made some soundings which I have shown here—soundings 33 feet.

(Testimony of Lloyd G. Hill.)

Q. Well, where is that?

A. That would be the southerly end of the trap.

Q. Yes.

A. About the northerly end of the trap or the northwest end 21 feet and up the line of the lead line continued 16 feet.

Q. Up to the end of the lead line as it existed—existed when you were out there on this trap that you have just mentioned? A. Yes, sir.

Q. (By the COURT.) That means ebb tide?

A. At ebb tide; yes, sir.

Q. (By Mr. WINN.) What time of the month was it then? A. That was March.

Q. Well, do you know whether there was—how the tide was? Now, the tide changes or varies during the month. You know it is a little higher at some times?

A. I think the tides were quite low.

Q. At that season of the year? **[142]**

A. Yes, sir.

Q. And this was low tide 16 feet?

A. Yes; low tide.

Q. Sixteen feet at the end of the lead as it was then constructed? A. Yes, sir.

Q. Now, then, did you make any examination at that time to find out the condition, Mr. Hill, of the—of the ground that was covered with the water and as to whether or not there was boulders there or anything of that kind? You made—

A. Yes; I could say; yes, sir. Of course, pretty hard to tell anything below the surface of the water, but the ground between low water and high water was

(Testimony of Lloyd G. Hill.)

very rocky, large boulders, three or four feet high.

Q. On what island is this?

A. This is on Admiralty Island; Admiralty Island.

Q. About how far from Funter Bay?

A. Well, I imagine five or six miles from the cannery in Funter Bay.

Q. You mean the cannery in which Mr. Barron is interested? A. Mr. Barron; yes, sir.

Q. On what side of Admiralty Island is it?

A. On the west side.

Q. What, Mr. Hill, is—well, I will ask you that island—I will withdraw that question because I believe this other map will show that. Now, I will ask you, Mr. Hill, if you made a trip to this locality at any other time other than the date you have just testified concerning? A. Yes, sir; I made a trip last week.

Q. Do you remember about what day?

A. I think it was the 11th; down there the 10th and 11th.

Q. Of March? A. March, 1912. [143]

Q. This year? A. Yes, sir.

Q. Did you make any other observations as to the fish-trap that was then standing upon the ground and also make any other soundings or anything of that kind?

A. I did; yes, sir; I made other soundings there.

Q. Who was with you?

A. Well, there was Captain Mason and the deck-hand on the "Anna Barron," named Steve, I don't know his last name; Mr. Barron, and Mr. Barron's two pilers—I think two pile-driver men.

(Testimony of Lloyd G. Hill.)

Q. Now, I will hand you, Mr. Hill, Plaintiff's Exhibit "D" for identification, which Mr. Dudley testified concerning, and ask you who drew this exhibit?

A. I drew this map.

Q. How did you get the data from which you drew the map, Mr. Hill?

A. Well, I had the notes from the former survey and what additional notes I wanted to take I made them from actual survey upon the ground.

Q. Who, if any one, aided you in making the soundings at that time?

A. Why, Steve, the deck-hand on the "Anna Barron," and two pilers and myself the last time, and the first time Captain Mason, and Mr. Barron. We were all present in the boat.

Q. Now, this map and plat which you have, marked D for identification, is just the same so far as the data thereon placed as is on Plaintiff's Exhibit "E," that is so far as they are extended on Exhibit "E"? A. Yes, sir; I think so.

Q. Then, you made some additional measurements and—how, Mr. Hill, did you find the structure that you had seen upon this ground, called the fish-trap, on your previous trip, with respect to the one you found when you made this trip **[144]** last week?

A. Well, the first time I was there the fish-trap was more or less incomplete?

Q. Yes.

A. The pot and the spiller and the heart—those things were not nearly as uniform as they are now and the lead line as it extended from the nearest end at

(Testimony of Lloyd G. Hill.)

that time toward the shore a distance of 261 feet.

Q. How many more piles are there in that lead than was there at the time that you testified upon the hearing on the motion to dissolve the temporary restraining order?

A. How many more—there is 14 piles has been—15, I think.

Q. Yes. A. One is out.

Q. And where have they been driven with respect to the end of the lead that you found, as you have testified to, and as it is marked on Exhibit "E"—where were they driven with respect—

A. They had been driven on the line of the lead as it then existed in a northeasterly direction toward the shore.

Q. Then it extended 261 feet in further toward the shore than it did when you were out there on that other trip? A. Yes, sir.

Q. And how many piles did you say had been put there? A. Fifteen.

Mr. JENNINGS.—How many feet did you say, Judge?

Mr. WINN.—261 feet.

Q. Was there web on the trap when you was there?

A. No, sir.

Q. Do you know anything about this web that was hung in from the last pile in toward the shore line that Mr. Dudley testified about? [145]

A. No, sir; I have never seen it.

Q. You didn't know anything about that. Now, Mr. Hill, you say in addition to making this estimate

(Testimony of Lloyd G. Hill.)

or count of the piles, and so on, you did some sounding there. Did you indicate to the Court what soundings you made and if they are represented on this exhibit? I wish you would point out to the Court.

A. I made soundings from the east corner of the fish-trap over toward the bare rocky point and from that point I then ran back a line of soundings toward the pile nearest inshore of the fish lead. From that pile I carried a range of soundings on a line through to what is known as U. S. Mineral Monument No. 804, simply as fixing the position of the soundings. The soundings are marked on here and were taken at low water on March the 11th of this year.

Q. The soundings as marked on this map or plat are just as you found them upon the ground, or are they different?

A. Just as I found them at that time.

Q. Yes. Now, this was what day—the 11th of March? A. Yes, sir.

Q. What depth of water did you find at the pile nearest the shore in the lead of the trap?

A. Eight feet. Is marked on the plat.

Q. What stage of the tide was it when you were there, Mr. Hill?

A. Why, the tides according to the tide table would be out, I think, at 1:50 in the afternoon, the low tide, and I started making soundings about 12:30. I completed them about one o'clock; so it wasn't quite—wasn't quite low tide.

Q. Yes. Now, do you know from an examination of the tide books as to whether or not the tide at that

(Testimony of Lloyd G. Hill.)

time of the month is less or greater than it is at other times of the same month? Have you examined the tide tables, and so forth, to ascertain that? [146]

A. Why, the tide—they were very short run-outs; not a low tide. The tide could be much lower. Take the June tides will probably run out 600 feet lower than the March tides.

Q. Taking then at the lowest tides, approximately, would leave about how much water or depth of water where that last pile is in the lead, that is, approximately, without calculating it?

A. Why, wouldn't be over two feet of water there at the very lowest tide.

Q. Well, ordinary low tide?

A. Ordinary low tide, probably be four or five feet.

Q. Mr. Hill, I see you have some indications on this map here that might indicate the contour of the ground. Will you just explain from this map or plat to the Court how the land embraced in survey 804 is along the lower line of it—along the water edge, that is, as to steepness or whether it is level? Well, explain the contour of the ground along there to the Court.

A. The ground abutting the waterfront of this claim is steep, rocky bluffs on the easterly portion, with the exception of a very little corner at the extreme east which is rather good ground; could be utilized; and the westerly part of the claim is very good beach and waterfront very fair at *law*—at low tide the area between low tide and high tide is covered by large boulders and rocks, but at extreme high tide

(Testimony of Lloyd G. Hill.)
there is quite a gravelly beach on the westerly.

Q. (By Mr. JENNINGS.) Which is north and south, and east and west?

A. North and south is there.

Q. Where?

A. Right up; looking right up this way. [147]

Q. That is north or south?

A. And east or west (indicating).

Q. (By Mr. WINN.) How is the shore line within, looking—the boundaries of this claim from the—from where the line representing the lead of the trap, if extended, would intersect the shore on out at what—is that westerly? A. Easterly.

Q. Easterly end line of the ground embraced in the survey?

A. A prolongation of the lead line would intersect with the shore line, would leave 172 feet from the east corner of the claim.

Q. Well, how is that—how is the ground there—the shore—the shore line?

A. The shore is rough, very rough.

Q. Is it precipitous? What would you say? What is the size—what is the height of the bank there?

A. Well, it runs back quite bluffy and steep; yes, sir.

Q. And the other part of the shore line you was testifying to concerning a while ago, is that what remains between the intersection of the prolongation of a line of the lead out to the westerly end?

A. Yes, sir.

(Testimony of Lloyd G. Hill.)

Q. End line of the claim? A. Yes, sir.

Q. Survey number 804. Now, Mr. Hill, you have marked on this map and plat here—what is that covered by what? A. Covered by large boulders.

Q. Covered by large boulders. Is that where you say you found the boulders? A. Yes, sir.

Q. What is this line you have marked on there? Line of low tide? [148]

A. Dotted line is marked line of low tide.

Q. You mean as low tide was at the time you were out there? A. Yes, sir.

Q. The time you were out there, and you have ascertained that low-tide line was the tide was out when you was out there clear on across the waterfront in front of survey 804, have you?

A. I have; yes, sir.

Q. Is that accurately placed upon there?

A. Yes, sir.

Q. Have you indicated upon this map—I withdraw that question—I see you have the letters upon this map "Alexander lead line Mar. 28th, 1911." I will ask you to state to the Court what you mean by that.

A. I mean that was the position of the piles on March 28, 1911, as I was informed they were driven by Mr. Alexander.

Q. But you wasn't informed as to how they were on the ground? You found that out by this trip you made? A. Yes, sir; I located that by survey.

Q. And that is the same piles you testified concerning on this other exhibit that was offered in on the motion to dissolve?

(Testimony of Lloyd G. Hill.)

A. Yes; I think they are in the same position.

Q. Yes. Now, did you notice any other changes there other than you have testified concerning, Mr. Hill? Just wait a minute—I want to withdraw that —that isn't a fair question. I will withdraw it. Oh, yes. I don't believe I had asked you, Mr. Hill, in regard to this map and plat the distance between the pot and filler (spiller) of this trap to the prolongation of the westerly end line of this survey?

A. Why, it is the—there seems to have been an addition made to it from the fish-trap that I saw there —it has been driven more to the westward; extended this way, which would [149] naturally decrease the distance between the west prolongation of the claim line and the beach—beach and the trap.

Q. Yes. Well, now, can you give to the Court the distance that you have there that you found on this last trip from this pot and filler (spiller) to this line that I have just mentioned?

A. Yes, sir; about 100 feet at present.

Q. And what did you find it when you were out there the other time?

A. I think it was 200 feet as I recollect my testimony.

Q. What was the distance between the pot and filler (spiller) and the lower end of the trap as you found it when you went out there last week and this first object you call a reef? Just give that to the Court so we can get it in the record.

A. The point of the reef that I succeeded in getting at that time the distance of 365 feet.

(Testimony of Lloyd G. Hill.)

Q. Yes.

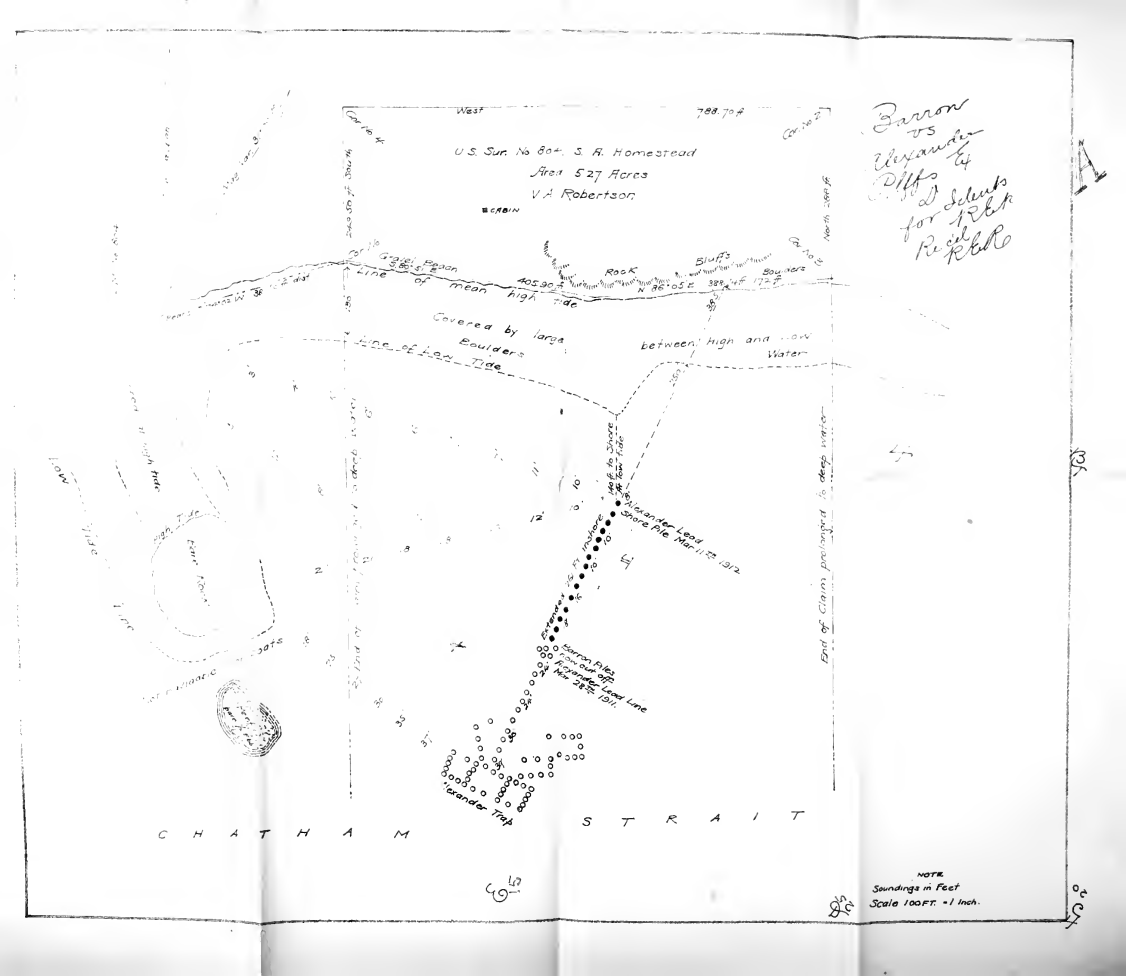
A. And it was also that to the point; to the rocky point.

Q. Did you notice, Mr. Hill, the condition of this reef and also—that is marked "reef"—and also this peninsula that extends out as indicated on this map, which you have marked "covered at high tide" and "bare rock." How these objects were at low tide as the tide was when you were there last week?

A. Yes, sir.

Q. Explain to the Court, then, how they were.

A. Why, they were bare. The passageway between the reef and the bare rock, was a little rock there, but I hardly couldn't go through there with a rowboat. The peninsula that extends out was, of course, all completely bare and it formed a very good shelter or harbor there. [150]


West
788.7 ac.
U.S. Sur. No. 804, S. R. Homestead
Area 5.27 Acres
V.A. Robertson
CABIN
Rock
Bluffs
Boulders
Line of mean high tide
Covered by large Boulders
Line of Low Tide
between High and Low Water
Alexander Lead
Shore Pile Mar. 11.75 bar.
Entrance to Inshore
Barron Pike
Alexander Lead Line
Mar. 8.5 ft. hill
Alexander Trap
CHATHAM STRAIT
End of Clam peninsula in deep water
NOTE
Soundings in Feet
Scale 100 F.T. = 1 Inch.

(Testimony of Lloyd G. Hill.)

Q. Did you also at that time make the soundings that is indicated, that commence from this bare rock and extend on towards the pot and filler (spiller) of the trap? A. I did; yes, sir.

Q. Are they—are they correct as placed upon this exhibit that you are testifying to?

A. I think so; yes, sir.

Q. I believe I will ask you to state for the sake of the record and the Court the entire length of the trap that you saw upon this location when you was out there last week. I mean including pot, filler (spiller), lead and all. A. 520 feet.

Q. As against how many feet when you were out there on the trip just before the preliminary hearing?

A. Against 250 feet.

Q. (By the COURT.) What were those figures again, Mr. Hill? A. 250 feet.

Q. Five hundred feet?

A. Was the first survey of 520; was the last 250.

Mr. WINN.—I think that is all, your Honor.

COURT.—Cross-examine.

Mr. WINN.—Well, I am going to offer in evidence now this exhibit from which Mr. Dudley testified and Mr. Hill and which was marked Plaintiff's Exhibit "D" for identification and ask that it be received.

COURT.—Any objections?

Mr. CHENEY.—No.

COURT.—It may be received in evidence and marked. Cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Mr. Hill, what method

(Testimony of Lloyd G. Hill.)

did you use in ascertaining [152] the depth of the water where you have marked the soundings from the trap clear over to the point there, that last sounding? What method did you use?

A. I borrowed the sounding line, I guess they call it, off the "Anna Barron" marked every fathom.

Q. That is what you used in making the soundings?

A. Yes, sir.

Mr. WINN.—Mr. Cheney, would you let me ascertain from Mr. Hill one fact here I want to find out?

Mr. CHENEY.—Yes.

Q. (By Mr. WINN.) I think may be—did you give to the Court a while ago in answer to my question the entire length of—of the Alexander trap as you measured it when you were out there a week ago?

A. Yes, sir.

Q. Did you run from the lower end?

A. Yes, sir.

COURT.—Said 520 feet.

Mr. WINN.—What?

WITNESS.—520 feet.

Q. (By Mr. BURTON.) That is from here, is it?

A. Yes, sir.

Mr. WINN.—Well, I thought stated another, your Honor; thought may be there was some conflict.

COURT.—Proceed.

Q. (By Mr. CHENEY.) You say you used the sounding line from the "Anna Barron" to make these soundings? A. Yes, sir.

Q. And when you made your map and put these figures on the map, Mr. Hill, you were in town, in

(Testimony of Lloyd G. Hill.)

your office? A. Yes, sir.

Q. And when you—and put these on the map here how did you [153] find out where to put them on the map, that is, what method did you use?

A. Of course, we have a range line, you know, that fixes the position. We know where we are on the water. Of course, we have to estimate more or less the distance which we traveled; try to make it every forty feet. You can't do it absolutely accurate because of the swell, but you get it very close, and then you keep your range which is traveled between two points.

Q. And about every forty feet make a sounding?

A. Yes, sir.

Q. What did you do that with—a small boat or a large one? A. Small boat; rowboat.

Q. Rowboat? A. Yes, sir.

Q. What method did you use in measuring the distance—well, I believe you said the distance was 365 feet from this point of the reef you examined over to the trap? A. Yes, sir.

Q. And what did you use to measure that?

A. Well, I used two methods. I triangulated it and also took stadia readings.

Q. Took what?

A. Stadia readings; that is, by knowing the object which you sight on and having fixed wires you have, your distance is determined between those two points. Then, of course, you check your instrument before and after you get through your work. Know absolutely. You see the instruments are so reg-

(Testimony of Lloyd G. Hill.)

ulated, having a rod to sight on Every foot of the rod would indicate 100 feet on the horizontal measurement; used by the United States Government very extensively in all their plane table work. [154]

Q. And the other way, you say you triangulated?

A. Triangulated; yes, sir.

Q. Now, how did you determine the—I withdraw that—this map with the exception of these few measurements of the water and the indication or the extension of the lead and some of those things is the same map you testified to here a year ago?

A. Yes, sir.

Q. Made the 28th of March? A. Yes, sir.

Q. And you didn't determine on this last trip the location—you determined on the—the location of this reef for instance when you made your first trip last year, as you put it on the map?

A. Then, I determined again this time.

Q. You didn't go over the whole survey, did you?

A. I found all the important points again; yes, sir.

Q. You didn't go over all the map?

A. I didn't run the claim out again as I did the first time.

Q. What did you—how did you determine the location of this reef here—of this reef from this little peninsula as you have it there on the map? How did you determine that?

A. Why, I determined that by triangulation and by stadia reading.

Q. What direction is it, Mr. Hill, from the rock there that you have marked "bare rock"? What

(Testimony of Lloyd G. Hill.)

direction is this little reef from that rock? You have it the same—it is the same on that map?

A. It is southerly; southerly of that rock.

Q. Southerly direction? A. Yes, sir.

Q. That is the way you have it on the map?

A. Yes, sir; yes, sir. **[155]**

Q. Think that is accurate?

A. I think so. Of course, you understand the entire reef is pretty hard to get that; I was over it, you know. Perhaps there is a point on there which I considered, accordingly certain things you have to fill in.

Q. Isn't it a fact that is the highest part of that reef from this end of this little peninsula that is marked "bare rock" and isn't it a little west of south? Isn't it west of south?

A. Yes, slightly; don't think—

Q. It appears on the map there it looks as though it was a little east of south from your map, doesn't it?

A. Well, that map, I should say from the point it was due south to the point I took as here in the reading. The point I took—I took this edge of the reef, you see.

Q. What?

A. I took what would be the west edge of the reef and from the point on the shore which I took would be south. Then the reef trends in a easterly, southeasterly direction, that is the trend of the reef. Of course, it is covered with water and you can see the rock. You can go over it with a small boat.

Q. That is the only way you determined it?

(Testimony of Lloyd G. Hill.)

A. Yes, sir.

Q. So, this line of low tide you have marked on this last map, Mr. Hill, that is a sort of an estimate, isn't it?

A. Well, that is fixed in three different points. It is fixed at the prolongation of the east boundary of the claim; the prolongation of the west boundary to mean low water, and it is fixed by a point marked "250 feet" on this plat from the shore in to the lead; also fixed at another point marked "140 feet" from the shore end line; so it is fixed at four [156] different places.

Q. Four different places across the whole length of the survey? A. Yes, sir.

Q. Is it approximately correct with reference to the elevation or did you go into that? Did you take any certain level and then figure the extreme low and extreme high there of— A. Of the tide?

Q. Of high tide or low tide? A. No.

Q. Well, did you just do it from observation, Mr. Hill, as the tide was that day which—

A. Of course, I took the tide that day.

Q. Yes.

A. Then, I also took the tide from the tide-table for the very extreme low tides and, of course, they cover phases—a certain; they have a certain horizontal plane they take their tides from, and then when the tide is below that theoretical plane why you simply add your high tides to the extreme low tides and multiply up your ratio or ranges wherever you might be and you can arrive very closely to what

(Testimony of Lloyd G. Hill.)

the extreme low tide would be.

Q. Well, I say in this particular instance you didn't go to that trouble. You didn't determine your line you have marked on the map as low tide—that wasn't determined in that way?

A. That is absolutely determined in that way for that tide of March 28th.

Q. Although you said it was determined at these four places from actual objects on the ground?

A. Yes, sir; I had those four places in between, Mr. Cheney, to more or less just fill in.

Q. Yes. Well, that is, I think I understand, then you determined [157] it from actual observation of the tide at the four places you have mentioned, ascertaining the location of that survey as it was that day? A. Yes, sir; as it was that day.

Q. And *you* soundings here that you made you say were made about 12:30. That wasn't low tide?

A. Took some time to complete. I think took about half an hour.

Q. You finished about one o'clock?

A. I finished about one o'clock.

Q. And the tide-table showed that the tide would be low that day at 1:50 you say?

A. Yes, sir; and this, of course, is made on a basis of the low tides, you know. I was figuring that.

Q. Oh; you figured on that differently, did you?

A. Yes, sir.

Q. According to the tide-book?

A. Yes; figured on that.

Q. Well, the tide-book gives the tide at Sitka, not

(Testimony of Lloyd G. Hill.)

at Chatham Straits, doesn't it? Isn't there a difference? Did you figure on that difference?

A. Yes, sir.

Q. That is true; something like thirty-five minutes?

A. Well, there is very little; there is hardly ten minutes difference between—

Q. There isn't as much there as there is here?

A. No, sir; I think it is ten minutes. It is hardly observable.

Q. You have a measurement here of—well, it doesn't appear on this map—something that is on the other one—on this map that you made last spring, Mr. Hill, you have 330 feet from here over to there? A. Yes, sir.

Q. That doesn't appear on this map? [158]

A. No sir; I don't think so.

Q. You didn't measure this distance then only—you see the 365 feet?

A. Yes; I got a point right here.

Q. Where is that 365 feet?

A. I got a point right here from the corner of this trap—from the southwest corner of the trap to the shore directly in front of the point marked "bare rock" would be 365 feet.

Q. Yes. A. That is—

Q. But I say you didn't determine this distance on the last trip. This was determined a year ago?

A. Yes, sir; no, the reef I didn't.

Q. You didn't determine—

A. Didn't determine only just—

(Testimony of Lloyd G. Hill.)

Q. This doesn't show the last—do these represent the last piles that were driven since you were there last year? A. Yes, sir.

Mr. WINN.—Better indicate what exhibit you are talking from, Mr. Cheney.

Mr. CHENEY.—Well, I am talking from Plaintiff's Exhibit "D" for identification.

Q. And this represents on Plaintiff's Exhibit "D" for identification the last pile, Alexander's pile, as it stands now, that is this last trip that you made?

A. Yes, sir.

Q. And you think, Mr. Hill, that at extreme low tide there wouldn't be more than two feet of water?

A. I think the very lowest tide wouldn't be over two feet of water.

Q. That is, you said the June tide?

A. Yes. [159]

Q. The very lowest tide, if that is in the month of June, that is the tide you mean when you say there wouldn't be over two feet of water?

A. No, sir.

Q. Wasn't any tide in the month of March when wouldn't be over two feet of water?

A. Well, I couldn't say. Have to examine the book. Have to examine the tide-table, you know. I don't think there would be though; no.

Q. Oh. How far is it, Mr. Hill, from what you call the rocky bluff there, that little point—there is a kind of rocky point comes down?

A. Yes, sir.

Q. Indentation into the water, and how far is it

(Testimony of Lloyd G. Hill.)

from there over to the east line of the survey according to your map?

A. It is about—well, it is about 125 feet; I should say 100 feet.

Q. Well, now, I ask you if you examined that map which you made last year and was introduced in evidence—that map isn't correct, is it, as to the distance from—from where you run that line up over to the east line of the survey?

A. Yes, sir; I think it is.

Q. Isn't that a little short?

A. Yes, sir; I checked that over again this year. This time I was with Mr. Barron and Mr. Barron helped me.

Q. Did you measure from the rocky point over to the easterly or from where the extended line would be?

A. I measured from the corner marked No. 2 to the prolongation of the lead—its extension with the lead line.

Q. That is where you mean 125 feet?

A. No, 172 feet—125 feet, I thought you had reference to the difference between the little bluffy country and corner No. 2. [160]

Q. I said that is what you say 125 feet?

A. Yes, sir; I think 100 feet; pretty hard to determine.

Q. But when I asked you the question I meant a little rocky place, let's see, about in here, on Plaintiff's Exhibit "C"—well, on the ground itself—isn't there a little kind of a rocky sort of prom-

(Testimony of Lloyd G. Hill.)

ontory? A. Yes.

Q. Well, that is what I wanted when I asked the question. How far from there over to that east line, if you know? A. Well, I don't recollect.

Q. I didn't mean—

A. That is about in the center of that kind of steep promontory; is about in the center of the claim; be about 400 feet.

Q. About 400 feet? A. Yes.

Q. There isn't much difference, Mr. Hill, in the beach there, between this part of the beach over here towards the east side of the claim and over here—there isn't much difference?

A. Oh, pretty rocky—

Q. Pretty rocky? A. —and boulders.

Q. As a matter of fact, the bedrock shows there quite plainly on what has been called in this case the sandy beach—the bedrock shows and great big boulders, high boulders show?

A. That is only between high and low tide. The beach is in water at high tide.

Q. Yes; I know—way above the line of high tide. Is this a little sandy beach? A. Yes, sir.

Q. But down here the land where the tide ebbs and flows it is real rocky? **[161]**

Q. (By Mr. JENNINGS.) The whole length of the claim from east to west? A. Yes, sir.

Q. Just about the same from the other end along?

A. Yes; just about; there are more boulders on the west side; larger.

Q. More boulders on the western side than on the

(Testimony of Lloyd G. Hill.)

eastern side? A. Yes, sir.

Q. And this Plaintiff's Exhibit "D" that you have been testifying from, I understand you to say that north is right to the top of the map and east is to the right and west is to the left? A. Yes, sir.

Q. Mr. Hill, what do you call the rocky bluffs—what have you located here on this exhibit "D," Plaintiff's Exhibit "D," that is just drawn from impression; from the eye; that wasn't triangulated or put there with any degree of accuracy at all, was it?

A. Well, to fix a thing when you are surveying along, you get a certain measurement—

Q. Yes.

A. —and right opposite you strike a bluff, and make a memorandum of that. It is more or less indefinite.

Q. It is more or less indefinite?

A. Just to show the position of those bluffs.

Q. As a matter of fact, let me ask you—doesn't the east end of that bluff cease—I mean doesn't what you have marked rocky bluffs there, that ceases before you get to the end of the lead, doesn't it?

A. Well, on the beach proper it would. On back any distance it is very rough and irregular, back any distance—I mean a point, say, in there would be bluff until here on the [162] beach it would be—would be to there from the bluff.

Q. But here—you have here and here there are nothing marked bluff at all—it is—there is no bluff, is there? A. No, sir.

Q. Did you take any soundings between what is

(Testimony of Lloyd G. Hill.)

marked there "Alexander's trap," between the line leading from what is called Alexander's trap to the shore, calling that one line, and then in considering the easterly side line of the claim—now, did you take any soundings between those lines?

A. Don't quite—I wish you would read that question over.

Q. I won't read it, but I will just ask—the question is accurately expressed. The stenographer will give it to you. In there I am talking about.

A. Yes, sir; I did.

Q. Where are those soundings—the record of them? A. They are in my note-book.

Q. Why didn't you put them on the map?

A. Well, I don't know. I could have.

Q. Well, you found the water just as good and deep there as anywhere else, didn't you?

A. Yes, sir.

Q. Plenty of deep water there?

A. Yes; pretty deep there.

Mr. CHENEY.—I would like to ask the witness a question, if your Honor please.

COURT.—Yes.

Q. (By Mr. CHENEY.) Mr. Hill, did you notice the bedrock along the shore there on the west side, towards the west end of this survey—see a lot of bedrock there?

A. Towards the west end of the survey?

Q. Yes. [163]

A. The bedrock seems to be about in the middle of the claim.

(Testimony of Lloyd G. Hill.)

Q. How far?

A. The bedrock is supposed to be about in the center of the claim; quite a good deal of it; it is just about in the center of the claim, I should say.

COURT.—Any further cross-examination?

Mr. CHENEY.—Nothing further.

Redirect Examination.

Q. (By Mr. WINN.) Now, Mr. Hill, maybe I didn't understand you, but did I understand that this line which is marked "line of low tide" as indicated upon Plaintiff's Exhibit "D," was figured out according to the extreme low tides of the year, or did you figure it as the extreme low tide of the date which you were on there?

A. That is the extreme low tide of March the 11th of this year, the way I measured it.

Q. And the sounding that you made to the last pile nearest the shore in the lead at that time was eight feet? A. Yes, sir.

Q. Do you remember or do you know approximately how far it is from that last pile out to the line of low water as it was on March—

A. Yes, sir.

Q. The 8th or 11th you was there?

A. The 11th.

Q. 11th. A. I was there the 10th and 11th.

Q. What was the approximate distance there?

A. 140 feet to the nearest pile.

Q. How is the water—does the water increase in depth from eight feet when inshore or become less?

[164]

(Testimony of Lloyd G. Hill.)

A. It becomes less; a foot or so less. In about the center, I think, it is six feet.

Q. Now, Mr. Hill, have you the soundings that you made on that—on the westerly—that is easterly, isn't it? A. That is easterly.

Q. On the easterly side of the lead line out to the extension of the—or prolongation of the easterly side line of the survey? A. Yes, sir.

Q. You have those? A. Yes, sir.

Q. Well, I wish you would get them and bring them to me sometime—that isn't in the record. Now, I will ask you, Mr. Hill, from the observations that you made there—what is this all down easterly from the prolongation of the easterly side line of the claim—what is there a clear sweep down there—land or water? A. Water.

Q. Of what? A. Waters of Chatham Straits.

Q. Now, this day—

This may be a new phase of questions I shall propound to him, your Honor, but I ask the privilege of asking him another question or so.

COURT.—Very well.

Q. (By Mr. WINN.) I will ask you if on this day you was there, there was any wind blowing outside on Chatham Straits as you went across?

A. The first day was very calm; the 11th was very windy.

Q. What direction was the wind blowing?

A. North; northeast wind.

Q. How was the water then in this cove or harbor that is made [165] by this reef that you have

(Testimony of Lloyd G. Hill.)

marked out here and the shore line opposite?

A. Yes; it was getting very rough; going down from Funter Bay down to the trap it was very rough, but as soon as we reached the trap why the winds all ceased. It was a good harbor; smooth, very smooth water.

Q. Well, state, from the topography of the country, the line of the shore line, the height of the hills, and so forth, what winds is this place protected from?

A. Quite protected in a north or northeast wind.

Q. (By Mr. JENNINGS.) North or northeast wind? A. Yes, sir.

Q. (By Mr. WINN.) Where? How?

A. The north wind comes right down, right down Chatham Straits. Chatham Straits is almost north and south and, of course, this affords quite a protection.

Q. Well, how would it with a southeasterly?

A. A southeasterly wind, it wouldn't be so good, I don't think.

Q. Well, how would it be with a wind from the easterly direction?

A. Easterly wind would be protected. Of course, this is just a very local plan; but a larger plan of Chatham Straits would show different conditions. The coast line, you know, changes very rapidly; have to go down—this is a very small scale.

Q. (By Mr. JENNINGS.) Now, just a moment. I want to understand his testimony. I understand you to say that the easterly wind you would be protected in that, or the wind blowing from the east or

(Testimony of Lloyd G. Hill.)

the wind blowing from the north, but the wind blowing from the southeast you wouldn't be so well protected? A. I say north or northeast wind.

Mr. CHENEY.—He didn't say from an east wind.

Q. You say all that way (indicating) be protected. [166] A. Yes.

Q. But blowing this way (indicating) wouldn't be protected?

A. I don't think would be protected so well.

Q. That is the wind blowing—

Mr. WINN.—If you will let me—I should prefer not to break up the record; get the testimony all broken up.

Q. Now, I have a map here, Mr. Hill. It is called "Lynn Canal, entrance to Point Sherman," which is a United States Government map. I wish you would locate on this map approximately, if you can, about where this fishing site is and explain about these winds covering the spot there and take the directions as they are indicated upon this Government map?

A. The approximate position of the fish-trap is marked by a cross on this.

Q. Well, say what side and what island it is on?

A. On the west side of Admiralty Island.

Q. Call the name of the peninsula?

A. Mansfield Peninsula; and about five miles from Funter Bay.

Q. Now, then, can you indicate there to the Court from the contour of that shore line and from the topography of the country, and so forth, as to what

(Testimony of Lloyd G. Hill.)

winds this cove— A. The north wind?

Q. Yes, sir.

A. The north winds then sweep down Chatham Straits, and, of course, is under this—in this little harbor, you are sheltered naturally, and a northeast wind—

Q. Yes. A. —would from the contour.

Q. Blowing off land?

A. Yes; a wind blowing off the land, you are protected; you are sheltered. [167]

Q. Well, what—this is south on the map?

A. That is south (indicating).

Q. And southerly winds blow hard in there?

A. Southerly wind would be very bad; wouldn't afford any protection for a boat; or a west wind, I don't think would afford much protection.

Mr. WINN.—Well, just a minute, your Honor. I think probably that is all. If your Honor please, this is just about the time to quit, and I presume your Honor will adjourn now. I want to get my testimony together. I shall not take very long in putting the direct testimony in this case.

Mr. JENNINGS.—You are through with the witness?

Mr. WINN.—Yes; I am through with him so far as I know.

COURT.—I just want to ask one question of Mr. Hill so I won't forget.

Q. So far as the topography of the country is concerned, I understand from your testimony that all the harbor which would be included within the pro-

(Testimony of Lloyd G. Hill.)

longation of the end lines of this claim is substantially equally protected, that is, the—the reef protects all the harbor from winds—all the harbor that is in this there substantially the same?

A. Yes, sir; yes.

Q. That is, there isn't any difference in one part of the harbor—I mean the harbor that is included within the prolongation of the end lines of this survey—every part is substantially equally protected from the wind?

A. Nearly; of course, the nearer you get to the shore the more protection you have.

Q. I mean out so far as the trap is concerned?

A. Yes, sir; I think so; yes, along on that line.

COURT.—Court will adjourn, gentlemen. [168]

Mr. CHENEY.—Are you through with the witness? Are you, Judge Winn?

Mr. WINN.—Yes.

Mr. CHENEY.—You said something about in the morning.

Mr. WINN.—I don't think I will.

Mr. CHENEY.—You don't want to recall him in the morning? If you don't I want to ask him another question then I will be all through.

Mr. WINN.—I don't want to say I will recall him, but I say that I think that is all I want now. I asked that we adjourn until to-morrow morning.

COURT.—Very well; proceed, Mr. Cheney.

Recross-examination.

Q. (By Mr. CHENEY.) I will ask you, Mr. Hill, when you examined that survey number 804-B if you

(Testimony of Lloyd G. Hill.)

checked the angle at the intermediate meander point on the survey, that is, the—that intermediate point between the two corners on the waterfront, whether you checked this point out there? A. Yes, sir.

Q. Did you find that correct? A. Yes.

Q. You didn't do that again this time? That was last year?

A. Last year that was. I simply ran the measurement off. I checked that up. I didn't turn the angle again.

Q. You didn't check the angle? A. No, sir.

Q. No; did you last year?

A. I did; yes; last year.

Q. You are sure you found that; you are *sure checked* it last year?

A. Well, that gave me the cross lead line. I had to determine [169] that the very first thing to fix the cross lead; yes, sir.

Q. I may—I don't know as I quite make you understand—I mean the angle between the two meander corners of the homestead survey; not the lead itself. Did you check that? A. Yes.

Q. The intermediate points? A. Yes, sir.

Q. You think you checked that?

A. I certainly ran that out to fix the line I had to have it on there when I was on the ground there. No one knew where the lines were.

Q. You didn't make the original survey?

A. The original survey; no, sir. I merely took that chart from the Land Office, or copy or plat and then had to find out the ground.

(Testimony of Lloyd G. Hill.)

Q. Do you know who made that survey?

A. I think Charlie Davidson.

Q. Sometime in 1909?

A. I don't know when it was made.

Mr. WINN.—The plat shows.

Mr. CHENEY.—That is all.

Redirect Examination.

Mr. WINN.—Well, there is one thing, if your Honor please, I want to call attention to and have it corrected accordingly.

Q. You will notice on our exhibit "D"—is this "D"? A. Yes, sir.

Q. The corner marked No. 3 of the homestead—

A. Yes; that is wrong.

Q. —does not correspond to the survey, because really it is corner No. 2. It is transferred. Now, some of the [170] questions up here will make quite a little bit of difference.

A. The number is transferred, Judge.

Mr. WINN.—I would like to have it shown in the record that corner No. 2 on exhibit "E" is corner No. 3 on exhibit "D."

COURT.—Very well.

Mr. WINN.—I think that is the way it is in the official map.

COURT.—Yes. Anything further, gentlemen, with this witness?

Mr. CHENEY.—That is all.

COURT.—That is all, Mr. Hill. Take an adjournment, gentlemen, until Monday morning at ten o'clock. [171]

(Testimony of Lloyd G. Hill.)

Two o'clock, P. M., March 18, 1912.

(Motion calendar occupied morning of March 18th; hence further trial of case was not reached until two o'clock.)

COURT.—Ready to proceed, gentlemen, in the case of Alexander versus Barron?

Mr. WINN.—Yes.

Mr. CHENEY.—Yes.

COURT.—Call your next witness.

Mr. WINN.—Call Mr. Barron.

[Testimony of James T. Barron, for Plaintiff.]

JAMES T. BARRON plaintiff, being duly called and sworn, testified as follows in his own behalf:

Direct Examination.

Q. (By Mr. WINN.) Your name is James T. Barron, is it, Mr. Barron? A. Yes.

Q. You are the plaintiff in this case?

A. Yes.

Q. What is your business and has been your business for the last six or seven years, Mr. Barron?

A. Salmon packer.

Q. Where have you been engaged in that business? A. Funter Bay.

Q. Funter Bay, in Alaska? A. Yes; in Alaska.

Q. Are you engaged in the canning business out there on your own individual hook, or are you connected with some company or corporation, that is?

A. I am president of the Thlinket Packing Company.

Q. Are you likewise a stockholder in the Thlinket Packing Company? A. Yes. **[172]**

(Testimony of James T. Barron.)

187

(Testimony of Lloyd G. Hill.)

Two o'clock, P. M., March 18, 1912.

(Motion calendar occupied morning of March 18th; hence further trial of case was not reached until two o'clock.)

COURT.—Ready to proceed, gentlemen, in the case of Alexander versus Barron?

Mr. WINN.—Yes.

Mr. CHENEY.—Yes.

COURT.—Call your next witness.

Mr. WINN.—Call Mr. Barron.

[Testimony of James T. Barron, for Plaintiff.]

JAMES T. BARRON plaintiff, being duly called and sworn, testified as follows in his own behalf:

Direct Examination.

Q. (By Mr. WINN.) Your name is James T. Barron, is it, Mr. Barron? A. Yes.

Q. You are the plaintiff in this case?

A. Yes.

Q. What is your business and has been your business for the last six or seven years, Mr. Barron?

A. Salmon packer.

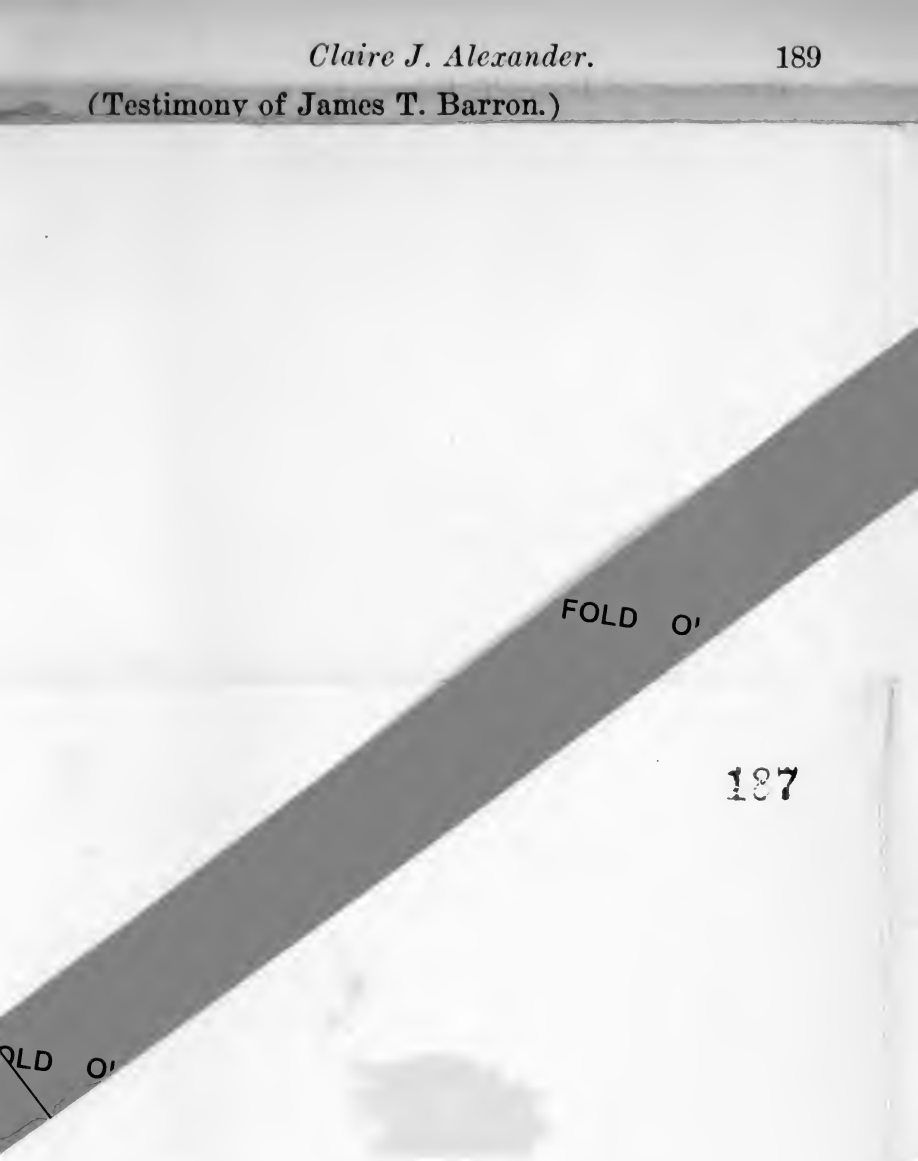
Q. Where have you been engaged in that business? A. Funter Bay.

Q. Funter Bay, in Alaska? A. Yes; in Alaska.

Q. Are you engaged in the canning business out there on your own individual hook, or are you connected with some company or corporation, that is?

A. I am president of the Thlinket Packing Company.

Q. Are you likewise a stockholder in the Thlinket Packing Company? A. Yes. [172]


FOLD O'
187
LD O'

No. 8302 PRICE 50 CENTS

TIDES

The time-values of the tides are given to correspond approximately with the standard time-meridian

	Funter Bay	Price Cove	Harbor Cove	Windham Bay
Mean time of high water after meridian passage	h m	h m	h m	h m
Mean time of low water after meridian passage	6 12	6 38	6 34	6 [illegible]
Mean height of higher high waters above plane of reference	15.6 ft.	16.4 ft.	16.0 ft.	15.6 ft.
Mean height of all high waters above plane of reference	13.1 ft.	13.8 ft.	13.6 ft.	13.1 ft.
Mean height of all low waters above plane of reference	2.1 ft.	2.6 ft.	2.4 ft.	2.1 ft.

The predicted time and height of the tide can be obtained from the TIDE TABLES published annually by the Coast and Geodetic Survey.

LIGHTS

Characters: Fixed, Flashing, Group Flashing, Occulting, Alternating, Group Occulting, Interrupted Quick, Morse, Isophase. Colors: White, Red, Green, Blue, Yellow, Orange, Violet. Reconstructed by Secondary.

Name	Latitude	Longitude	Characters	Color	Height above Datum	Nominal Range	Remarks
Entrance Island	[illegible]	[illegible]	Fl. W. 30 sec.	White	238 ft.	12 M.	
Sentinel Island	[illegible]	[illegible]	Fl. W. 30 sec.	White	820 ft.	12 M.	
Point Retreat	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	

FUNTER BAY

Scale 1/20000

Approximate Geographical Position of Astronomical Station
Latitude 58° 23' 44" N., Longitude 134° 56' 45" W.

Nautical Mile

0 1/4 1/2 3/4 1 1 1/4 1 1/2 1 3/4 2

Sherman Rock

Pt. Sherman

Entrance R.

Lodge I.

Gunge I.

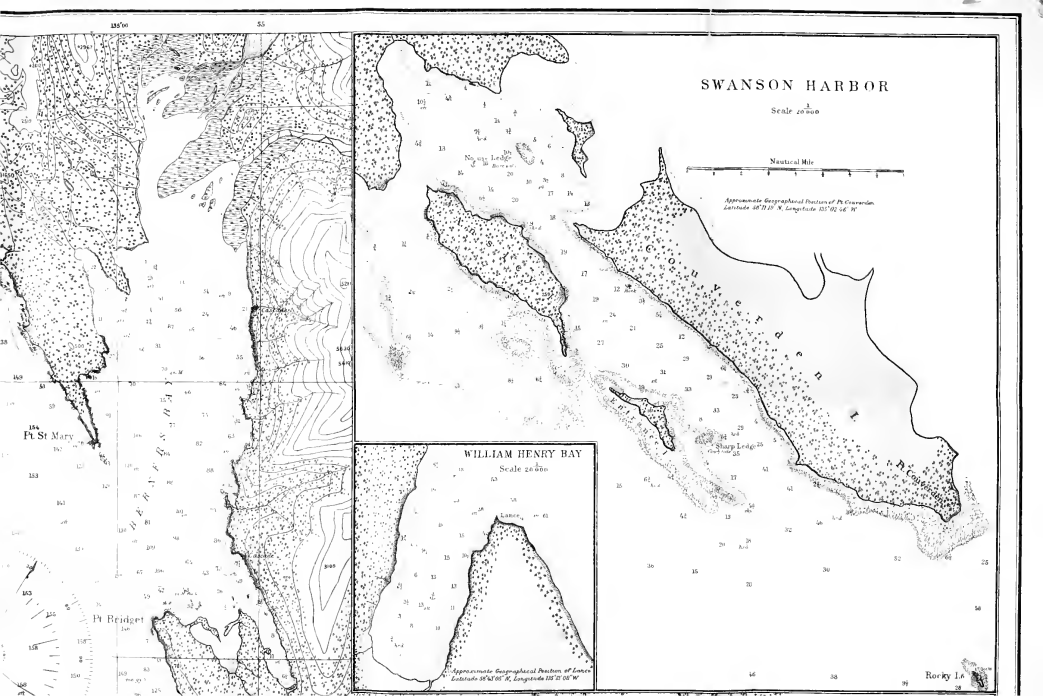
Clears Pt.

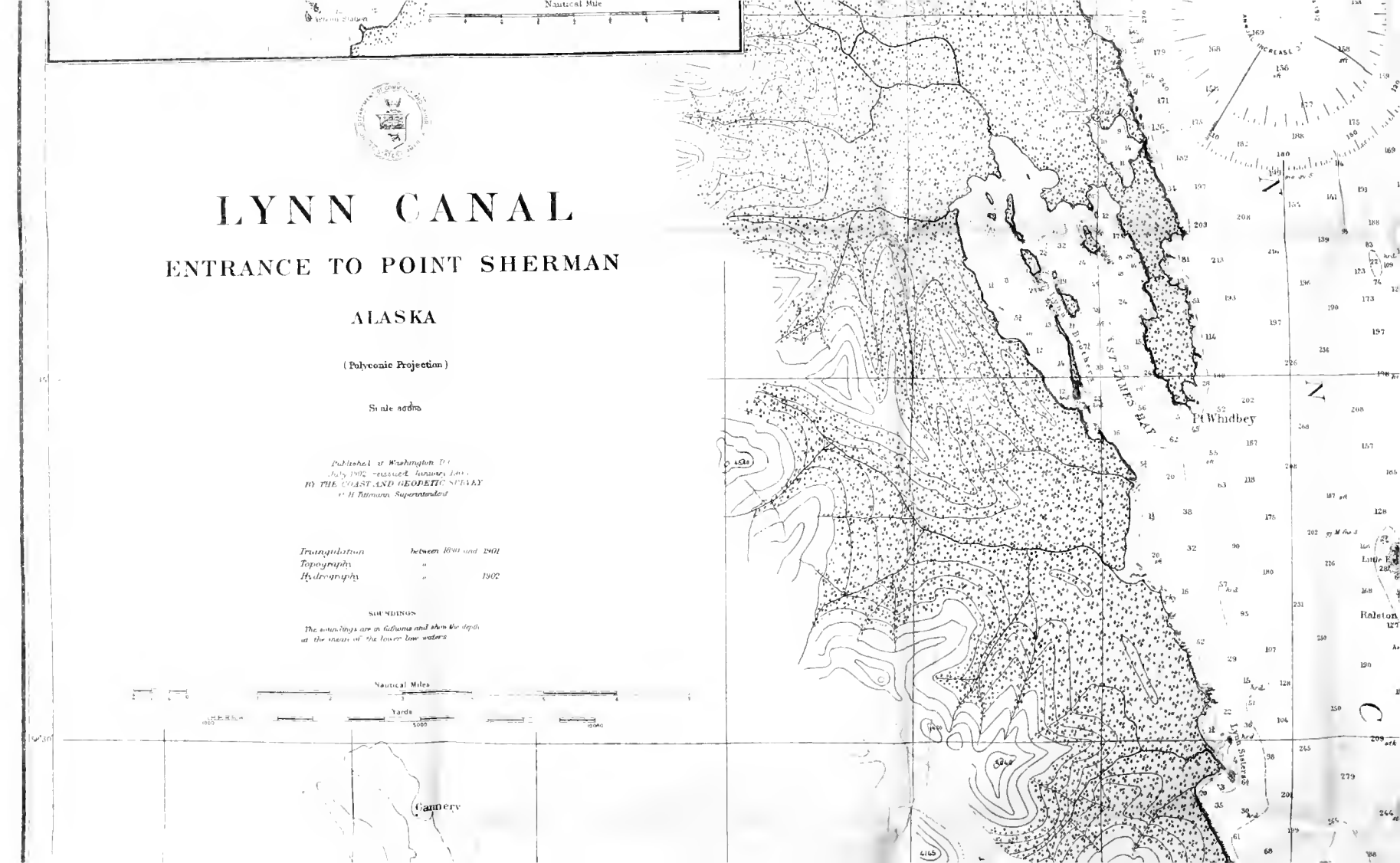
Stamp Mill

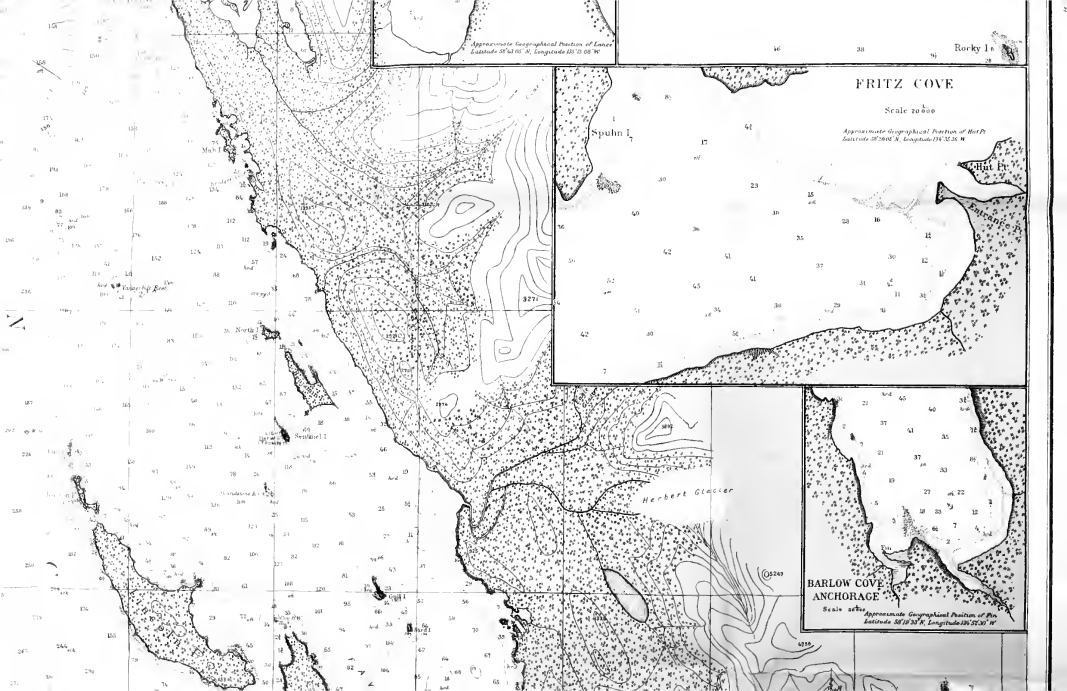
Funter P.O.

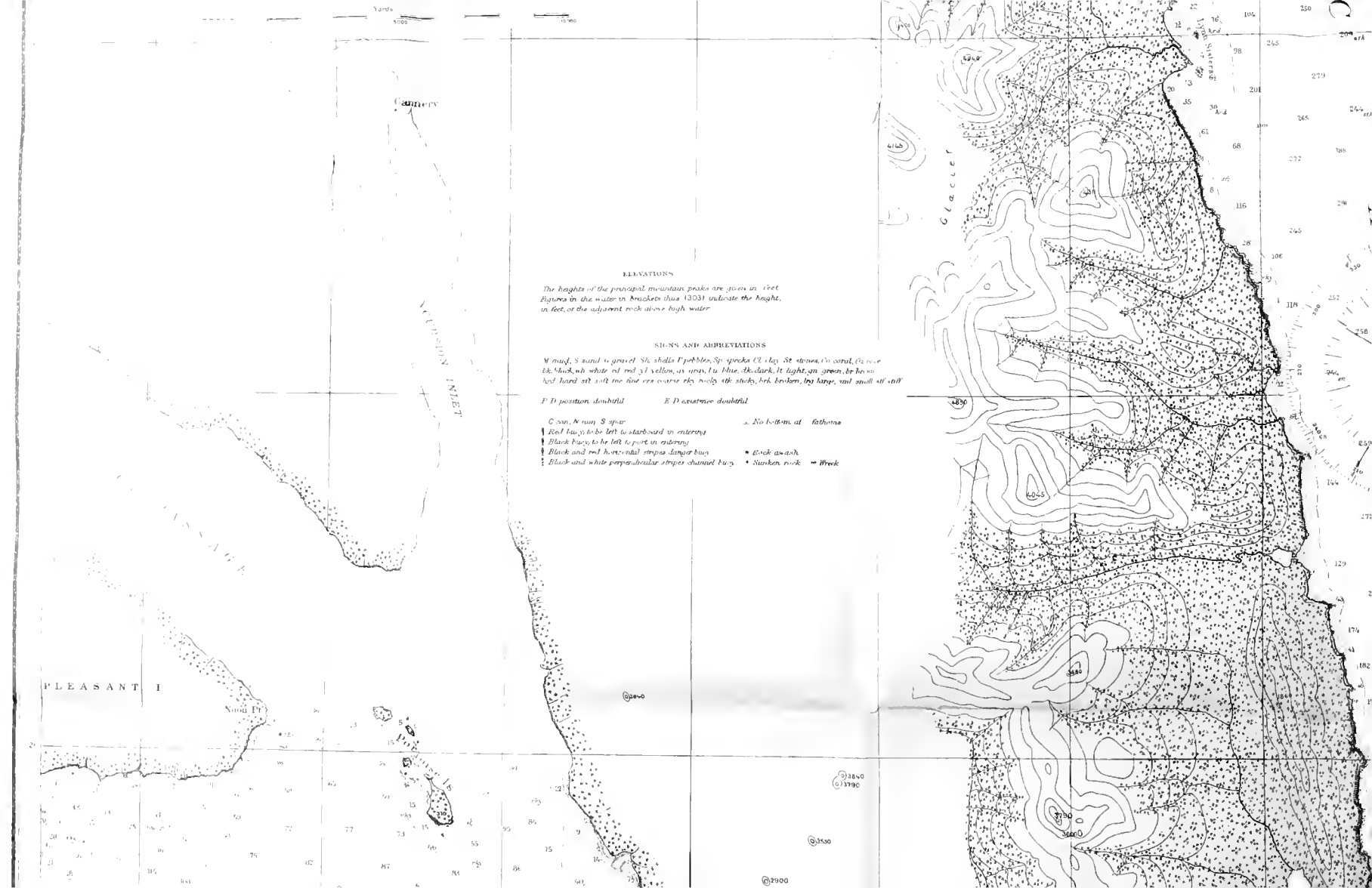
Station I.

Pt. St. M

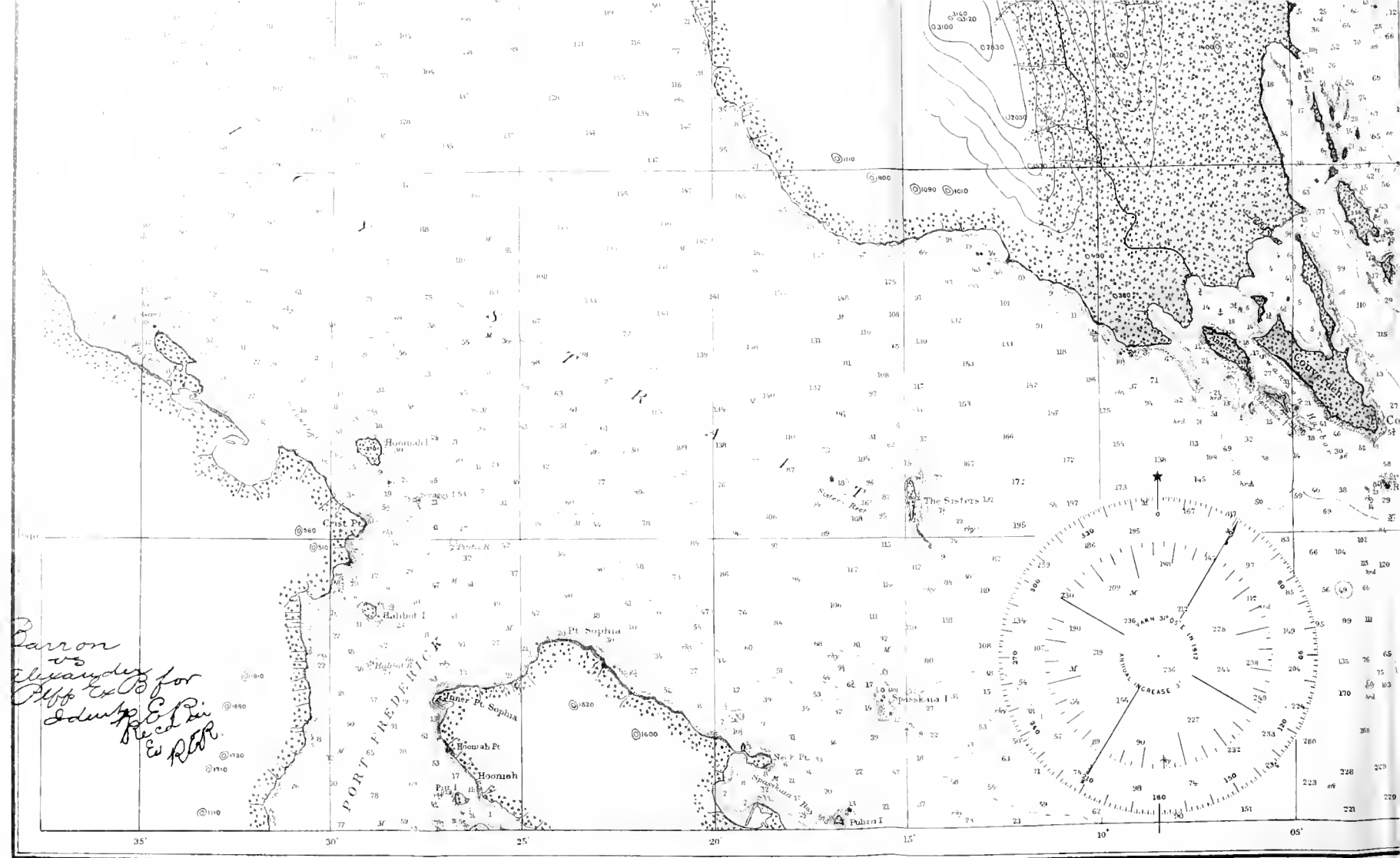

SWANSON HARBOR
Scale 1/20000
Nautical Mile
Approximate Geographical Position of Pt Courcelles
Latitude 48°31.0' N. Longitude 123°10.4' W
Pt St Mary
Pt Bridget
WILLIAM HENRY BAY
Scale 1/20000
Approximate Geographical Position of Lone
Latitude 48°41.05' N. Longitude 123°21.05' W
Rocky Lo

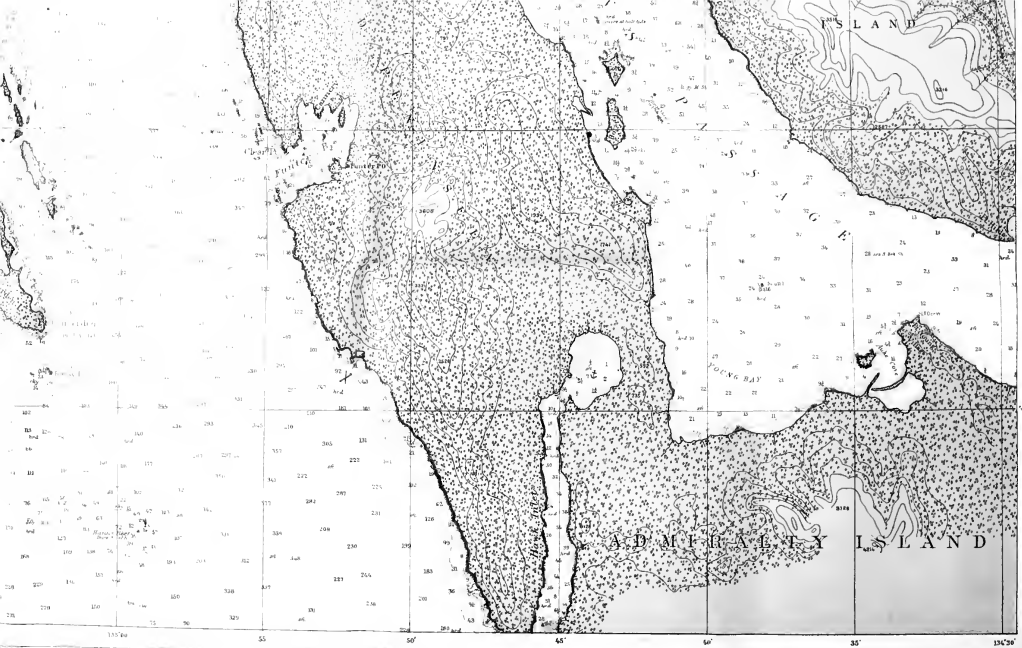

Nautical Mile
LYNN CANAL
ENTRANCE TO POINT SHERMAN
ALASKA
(Polyconic Projection)
Scale as drawn
Published at Washington D.C.
July 1902 reissued January 1903
BY THE COAST AND GEODETIC SURVEY
O. H. Tittmann, Superintendent
Triangulation between 1899 and 1901
Topography " "
Hydrography " 1902
SOUNDINGS
The soundings are in fathoms and show the depth at the mean of the lower low waters
Nautical Miles
Yards
Cannery
Pt Whidbey
Ralston
Lynn Entrance
INCREASE


Approximate Geographical Position of Lunes
Latitude 58°43'00" N. Longitude 137°21'00" W
Rocky Is.
FRITZ COVE
Scale 20000
Approximate Geographical Position of Hut Pt
Latitude 58°28'00" N. Longitude 136°32'30" W
Spuhn I.
Hut Pt.
Mud I.
Fisher Ice Field
North I.
Sentinel I.
Herbert Glacier
BARLOW COVE
ANCHORAGE
Scale as Above
Approximate Geographical Position of Pier
Latitude 58°18'30" N. Longitude 136°22'30" W


Yards
Cannery
Glacier
PLEASANT I
Wood Pt
ELEVATIONS
The heights of the principal mountain peaks are given in feet
Figures in the water in brackets thus (3031) indicate the height,
in feet, of the adjacent rock above high water
SIGNS AND ABBREVIATIONS
M mud, S sand, G gravel, Sh shells, P pebbles, Sp sprecks, Cl clay, St stones, Co coral, Oz ooze
bk black, wh white, rd red, yl yellow, gy grey, bl blue, dk dark, lt light, gn green, br brown
hrd hard, stf stiff, soft, fne fine, crs coarse, sty sticky, stk stocky, brk broken, lrg large, sml small, stf stiff
P D position doubtful
E D existence doubtful
C can, N nun, S spar
Red buoy, to be left to starboard in entering
Black buoy, to be left to port, in entering
Black and red horizontal stripes danger buoy
Black and white perpendicular stripes channel buoy
No bottom at fathoms
Rock awash
Sunken rock
Wreck


BARLOW COVE
ANCHORAGE
Scale 4 Miles
Approximate Geographical Position of Pin
Latitude 58°19'33" N. Longitude 136°35'38" W
Hump I
Eagle Rock
Pt Retreat
Barlow Pt
Symonds Pt
Portland I
Spruce Pt
Outer Pt
Long Mtn
Meade Glacier
1908
1909
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925


Hoomah I
Crist Pt
Rabbit I
Pt Sophia
Inner Pt Sophia
Hoomah Pt
Hoomah
Pan I
PORT FREDERICK
Spiskeah I
Spiskeah's Bay
Pubeni I
The Sisters
Scarce Reef
Coverdale
Barron
to
Alexandra for
Offo & B for
Admty E & Pi
Rec'd Pi
& RBR
Offo, CB



(Lynn Canal, from Entrance to Point Sherman)

C. & G. S. 8302

(Testimony of James T. Barron.)

Q. Approximately, what is your interest in that company, Mr. Barron?

A. A little less than three-quarters interest.

Q. And this company has a cannery at Funter Bay, Alaska? A. Yes.

Mr. WINN.—I will now, if it please the Court, offer in evidence in this case the map or the chart which has been testified from and concerning, which is termed "Lynn Canal, entrance to Point Sherman, Alaska." This is the same chart that several witnesses' attention was called to and has been identified in this case, and I now offer it in evidence.

COURT.—Any objections, gentlemen?

Mr. JENNINGS.—Incompetent, irrelevant and immaterial.

COURT.—May be received. Objection overruled.

(Plaintiff's Exhibit "B" received in evidence.)

Q. (By Mr. WINN.) On this Plaintiff's Exhibit "B," which has just been offered in evidence, there is a place called Funter Bay that is on Admiralty Island, on a peninsula of that island called Mansfield Peninsula, is that where the cannery is located, Mr. Barron? A. Yes.

Q. For you have just inspected the chart?

A. Yes, there is the cannery.

Q. You know where this—you know where this soldier's addi''onal claim number 804 is, do you?

A. Yes.

Q. About what distance is it from Funter Bay?

A. About five miles from the south end to the bay.

Q. Now in this cannery, Mr. Barron, that you are

(Testimony of James T. Barron.)

running at Funter Bay and which you say you are interested in, how long has your company been running and conducting a cannery there?

A. 1902. [174]

Mr. CHENEY.—If the Court please, object to this on the ground it is immaterial. *With* coincided with Judge Winn in his statement here in regard—at the beginning of the trial—that the intentions of Mr. Barron and his connection with the Thlinket Packing Company, and so forth, was all immaterial in the case. He stated that was his idea of the matter and we coincided with that. I don't see how it can be material whether he owns one share in that company or not. They are not parties in this suit, or whether they are operating somewhere else in the District of Alaska. I can't see the materiality of it.

COURT.—Well, there is—

Mr. CHENEY.—And I object to it because of its immateriality.

COURT.—Well, the only phase of the case that might make it material, that is if shown that the plaintiff was the owner of the upland here it might become material to know just what—to what extent he might desire to use the frontage for access to navigable water and the character of the business that he would be carrying on might have some bearing on that question. I will admit the evidence. I don't appreciate at this time just the full extent of its bearing on the merits of the controversy, but I will hear it.

Mr. WINN.—Yes; it is along that line, your

(Testimony of James T. Barron.)

Honor, and along the line indicated in one of the paragraphs in the complaint.

COURT.—He may answer.

Mr. CHENEY.—I ask for an exception to the overruling of the objection.

Q. (By Mr. WINN.) This cannery that is running there, Mr. Barron, for the purpose of packing salmon has a capacity of about how many cases per day? [175] A. About 3,000 cases.

Q. At the present time? A. At the present time.

Q. And what did it have, say, during the year 1911? A. Had the same, 3,000 cases.

Q. Same capacity? A. Yes.

Q. What means and methods do you use principally in catching fish, salmon, for the purpose of supplying that cannery with fish? A. Fish-traps.

Q. Now, I will ask you, Mr. Barron, what is used in the connection of building of fish-traps, that is, just explain it—I suppose the Court knows, but for the sake of the record?

A. Well, we drive piles from the shore out to where the heart, pot and spiller are, so far as generally can go driving piles, and then hang it with web.

Q. Well, now, just for the sake of this question. At present I just want to know what you use, and not particularly the manner in which it is constructed, that is, I understand you use piling and web and what else in the construction of a trap?

A. Piling and web and timbers.

Q. That is all I wanted for the sake of this company. Now, I will ask you, Mr. Barron, where you

(Testimony of James T. Barron.)

obtain the principal part of your piles for the putting in of your fish-traps each season?

Mr. JENNINGS.—Object to that, if the Court please, on the ground it is incompetent, irrelevant and immaterial.

Mr. WINN.—Following up the same thing, your Honor. I am going to show this place has been used as a harbor for the last years past with anything, his tows, and so forth, going in and out of there. I think it is part of the *res gestae* of the case. [176]

COURT.—He may answer.

Mr. CHENEY.—Exception.

WITNESS.—What was it?

Q. (By Mr. WINN.) I asked where, from what position relative to the land contained in survey number 804, do you get your piles for the purpose of constructing your fish-traps each season?

A. Down Chatham Straits, Peril Straits and Fresh Water Bay. This last year have been cutting at Fresh Water Bay.

Q. Well, now, on this exhibit "B" of plaintiff's, I wish you would indicate to the Court, commencing at Funter Bay and tracing down with your finger as to the general route that your steamers run to get these piles that you speak of to build your fish-traps?

A. Well, we go out of this bay here and then down the Straits—

Q. When you got out of this bay—is it Funter Bay?

A. We will have the cannery there—go out of Fun-

(Testimony of James T. Barron.)

ter Bay and down to this point here and then down the Straits.

Q. Down the Straits? A. Chatham Straits.

Q. Down past the ground contained in survey number 804? A. Yes.

Q. You go down near the ground that is contained in survey 804? A. Yes.

Q. And how much further off from, say, the ground contained in survey 804 does your steamers go to get the piling?

A. Oh, offshore, maybe a half a mile or mile.

Q. No; how far from the ground contained in 804 do you get your piles?

A. Oh, well, the best piling is at Fresh Water Bay; well, about, probably, 25 miles.

Q. To the southward? [177]

A. To the southward; yes.

Q. Yes.

A. To the south; down Chatham Straits.

Q. Approximately, during the year 1911 and for two or three years back of that, how many piles or how much timber as pilings do you use each season for the purpose of putting in and maintaining your traps?

A. I think year before last we had about—well, to go back further, why we didn't have the number of traps, of course, didn't need the number of piling, that we have at the present time.

Q. Well, I say during the year 1911 and, say, 1910. I don't care to go back further than that.

A. 1911, about 1100.

(Testimony of James T. Barron.)

Q. Piles? A. Yes, piles.

Q. What size, length, and so forth, timber average? A. Run about 75 feet to 100 and 110.

Q. And you get about the number you have spoken of in your testimony? A. Yes.

Q. And where these are, if they are not all towed from a point south of this ground contained in survey 804, about what proportion of these piles were brought from a point south of this survey 804 for the years 1910 and 11?

A. They were all with the exception of some on the beach I bought. Probably belonged to me, but I bought them from these beach combers.

Q. Do you have a towboat that is engaged for this business? A. Yes.

Q. What is the name of her? [178]

A. Well, the "Anna Barron."

Q. Who is master of her and who was the last year or so? Captain Mason?

A. Captain Mason; P. H. Mason.

Q. Have you any other boat that sometimes you do towing with? A. Yes, the launch "Buster."

Q. That is the old steamer, used to be the "Kodat"? A. Yes.

Q. And you put gasoline in her? A. Yes.

Q. Now, I will ask you, Mr. Barron, what year it was that you first became acquainted with this ground that is contained in survey 804 and especially the cove or little harbor that is right out immediately in front of it?

A. Oh, some years; but we used to run in there

(Testimony of James T. Barron.)

when Captain Crockett was captain of the boat several years ago.

Q. Captain who?

A. Captain Crockett;—before the Alaska Packers had driven any trap there.

Q. Well, you became acquainted with this cove or little harbor there before even the Alaska Packers' Association built any trap there? A. Yes.

Q. And who was doing your towing then? Who was master of your towing?

A. Captain Crockett of the "Anna Barron."

Q. And how did you come to get acquainted with it at that time?

A. Well, he used to run in there in a north wind for anchorage.

Q. Now, you say that was before the Alaska Packers' Association put a trap in there. What year did the Alaska Packers' Association first put a trap in this cove? [179] A. 1908.

Q. Do you know how many years they fished that?

A. One year, I believe.

Q. Do you know whether or not Mr. Alexander had anything to do with the fishing of that trap of the Alaska Packers' Association?

A. Well, I believe he drove the trap. He had charge of the driving crew—the pile-driver crew.

Q. Did you ever see that trap as it was constructed by the Alaska Packers' Association?

A. Well, possibly—

Mr. JENNINGS.—Object to it, incompetent, irrelevant and immaterial; whole line of questions incom-

(Testimony of James T. Barron.)

petent, irrelevant and immaterial; encumbering the record.

Mr. WINN.—Simply going to show the construction of the trap, your Honor. Alexander testified to it *very length* in the other trial that this place—trap he had was constructed right over the same ground that the Alaska Packers' Association's was.

COURT.—Well, at this time I don't know, Judge, how it can be material—if they should connect their title in any way with the Alaska Packers or their right to it, but I don't understand that the plaintiff is relying on any claim from the Alaska Packers, so isn't necessary too—

Mr. WINN.—Well, yes, sir; we make this question—we bought out the Alaska Packers' Association there; bought out Robertson there; then they go to work and build there—that is the proposition I was getting it to.

Q. Now, Mr. Barron, I will ask you—I believe you did say you saw the trap in there when the Alaska Packers' Association was fishing?

A. Yes. [180]

Q. That was 1908? A. 1908.

Q. Now, in 1908 do you remember anyone fishing that trap or not? A. No.

Q. When did you become acquainted with a man by the name of V. A. Robertson?

A. He worked for me, I think, about 1907. I think it was, or—

Q. Are you sure? A. Yes.

Q. 1907? A. I think it was 7—6 or 7.

(Testimony of James T. Barron.)

Q. Well, I mean the same V. A. Robertson from whom— A. Yes.

Q. —you received the deed to this property?

A. Yes.

Q. He is the son of old Captain Robertson?

A. Old Captain Robertson; yes.

Q. Now, you are the same James T. Barron that is mentioned as the grantee in the deed which I have offered in evidence in this case, which purports to convey the ground contained in survey number 804 from V. A. Robertson to yourself? A. Yes.

Q. I understand that you haven't that deed up here, so just state about the date of it—a year ago. Do you remember the date of the deed, Mr. Barron, without seeing the deed?

A. Well, March the 8th, I believe.

Q. (By the COURT.) What year, 1911?

A. 1911.

Q. (By Mr. WINN.) Now, I will ask you if you have made any settlement with the Alaska Packers' Association with any claim at all that they may have had to this ground in question? [181]

Mr. JENNINGS.—Object—

WITNESS.—I did; yes.

Mr. JENNINGS.—Object, incompetent, irrelevant and immaterial. Not in the complaint that the Alaska Packers has now or ever did have anything to do with this land.

COURT.—I hardly think it is competent under the pleadings. Plaintiff claims—

Mr. WINN.—He claims the upland, your Honor,

(Testimony of James T. Barron.)

but we want to show also for the sake of the record that he made a settlement and adjustment with the Alaska Packers' Association for any claim to the waterfront or shore line which they may have had claim to by reason of having fished and operated the trap there.

COURT.—I don't think that could possibly do the record, or anybody, any good unless you believe this claim is the Alaska Packers' Association. Now, if they had anything to convey over there and is pleaded, I can see how it might be material to prove it.

Mr. WINN.—Yes, sir. Well, it is very questionable, your Honor, in constructing the trap—we bought out Robertson, and as I say I simply propose to show that we bought out from the Alaska Packers' Association any claim that they had on that property.

COURT.—I am perfectly willing to permit any proof *if amend* the pleadings. Might as well come in here and *prove acquired* the interest from any other company. Can't be material under the pleadings and doesn't give the defendant—

Mr. JENNINGS.—We withdraw our objection to it.

Q. (By Mr. WINN.) Now, I will ask you if you had any adjustment or settlement of any claim that the Alaska Packers' Association made to any of the grounds in front of this survey 804? [182]

A. Yes; I leased it in 1910. They gave me a lease. That same time I went down to San Francisco and

(Testimony of James T. Barron.)

they didn't care about giving me a quitclaim deed for it, because they wasn't quite certain they would abandon all their rights of fishing grounds in this district. So, they said they would lease it to me for a nominal sum for a year and then we would make further adjustment. Later why they concluded they were not going to use their grounds.

Q. Then March 8th is the date of the deed from V. A. Robertson to yourself—on that date you purchased the survey 804—the upland from Mr. Robertson? A. Yes, sir.

Q. About how many times, Mr. Barron, have you been up the shore line of Admiralty Island along past this harbor or cove out in front of Survey 804? Now, I don't mean how many times have you been in there, but about how many times have you been up and down the shore?

A. Well, been quite a few times; of course, I don't remember.

Q. Well, are you pretty well acquainted with that— A. You ask as to this?

Q. —with that shore line on Admiralty Island, commencing at Funter Bay and continuing on down south so far as the island goes?

A. Yes; we used to fish down at Hawk Inlet the first year I was at Funter Bay.

Q. What is Hawk Inlet?

A. The inlet right here.

Q. Hawk Inlet is indicated—

A. About eleven miles from Funter Bay, eleven or twelve.

(Testimony of James T. Barron.)

Q. Yes. It is along—well, wait—now, you get through, Mr. Barron. The Hawk Inlet which I refer to—well, let's [183] mark it something, Mr. Barron.

COURT.—It is already marked.

Mr. WINN.—It isn't marked Hawk Inlet.

COURT.—Yes; it is.

Mr. WINN.—Oh, excuse me. It is that shore—well, it is marked Hawk Inlet on this exhibit "B" of plaintiff's.

Q. Now, I will ask you along that shore there, Mr. Barron, as to how it is in regard to harbors?

A. Well, there is no harbor between Hawk Inlet and Funter Bay excepting this cove in here; that is the only protection we have for anchorage from north winds—our Survey Number 804 between Hawk Inlet and Funter Bay.

Q. Now, that would be on the line—if that would be extended from your cannery down to Hawk Inlet it would pass Survey 804? A. Yes.

Q. Now, you know where you get your pilings. I believe you stated a while ago that your steamers came down that shore and then cut off across to the eastward, or isn't it—no, to the westward; to get across to Fresh Water Bay, or what is it?

A. To get to Fresh Water Bay on Chicagoff Island, just come right down the shore and then right down—

Q. Come down the shore by survey 804?

A. Yes; a little that way; strike about that direction, right along this, through about here.

Q. And what distance from Funter Bay is this

(Testimony of James T. Barron.)

place where you have been procuring your piles these last years?

A. 25 miles. Fresh Water Bay is—we are some ways up the channel, about five miles, I think; I don't know exactly, approximately about that much.

Q. Well, now, Mr. Barron, how many times prior to the commencement of this suit by yourself have you been in this little [184] harbor? I asked you a while ago the number of times you have been by it?

A. Well, I haven't been there myself—you mean with a steamer?

Q. No; no; just to put in there and to see the ground or go on by it to see it, and so you understood what was in there, whether a harbor or not?

A. Well, prior to the suit?

Q. Yes, prior to the suit.

A. Oh, several times, of course.

Q. Did you or did you not know of your captain having been in there before?

A. Yes; they have very—

Q. What time in the year 1911, Mr. Barron, did you leave Alaska and go south?

A. In September, the first part of September. I have forgotten the date.

Q. Well, sometime in September? A. Yes.

Q. After the pack was over? A. Yes.

Q. And when did you next come back to Alaska?

A. You mean 1911?

Q. Yes; after you left in September, 1911. This suit was brought in March.

Mr. BURTON.—March, 1911.

(Testimony of James T. Barron.)

Q. (By Mr. WINN.) Well, I mean 1910. This suit was brought in March, 1911. I want to know in the year 1910, in the fall, about what time did you leave Alaska to go south?

A. About September. I think the latter part of September. The middle or the latter part.

Q. In 1910? A. Why, sometime in September. [185]

Q. Now, what time did you return to Alaska?

A. In March, 1911. No, first of April. I left Seattle for Juneau.

Q. Now, let's get this date approximately. I want to know whether you go back to Alaska before this hearing was had on the preliminary injunction.

A. No; I was not here. I left Seattle on the "Humboldt" April the first.

Q. Then, from September, 1910, up to April, 1911, you were out of the District of Alaska? A. Yes.

Q. Now, you say that you had had a lease from the Alaska Packers' Association prior to that time. What, if anything, did you do upon any part of this ground in 804, or any ground or land in front of it, prior to your going down below in September, 1910?

A. Well, I intended after I got the lease in 1910, in January, I intended to use that for a fishing site, but I found the upland had been taken by Victor Robertson and instead of driving, why I didn't do anything there. I went over to the other traps I had a lease for and drove them.

Q. Well, now, then you got a deed from Robertson in March the 8th? A. 1911.

(Testimony of James T. Barron.)

Q. 1911? A. Yes.

Q. Yes, sir. Prior to this time did you know the—as to whether or not this was a place for anchorage and a harbor also? A. Oh, yes.

Q. Was it prior to that time that Captain Crockett had been in the habit of anchoring in there?

A. Yes. **[186]**

Q. Then, did you or did *you cause* anything to be done in regard to indicating your claim to this property before you went below in 1910?

A. Well, I gave orders to drive piling there, which I did in the spring of 1910, also to hold the ground and gave notice that I had claimed the right of a fishing site there like it has been the custom.

Q. How many piles did you drive there?

A. Three, I think.

Q. Put any notice on them? A. Yes.

Q. Do you remember what it was?

A. Well, it is my name James T. Barron and trap location.

Q. (By Mr. JENNINGS.) Just a moment, Mr. Barron. Was that notice—you say it was a notice—on there a written notice? A. No; it was—

Q. A written notice?

A. —on a board, I believe.

Q. I say it was written though on a piece of paper?

A. No; a board.

Mr. WINN.—On a board?

Q. (By Mr. JENNINGS.) Have you got that notice—a copy of it?

A. Oh, no; it is—I saw I think the board on

(Testimony of James T. Barron.)

one of the piles there the other day. It was washed out entirely it was.

Q. (By Mr. WINN.) You mean the letters were obliterated? A. The letters; yes.

Q. Now, that was in the spring of 1910. When was it that you first found that Robertson owned the upland immediately in front of this ground that had been used by the Alaska Packers—had been fished?

A. It was represented that there was a claim there. Someone had taken the upland and I ascertained it was Robertson. [187]

Q. Do you remember about what time it was prior to getting your deed that you found out Robertson had a claim there?

A. Oh; it was fully a year.

Q. Now, after you came back here from below and after this suit had been commenced and a hearing had upon the preliminary restraining order, when did you see that ground again after you came back in the spring of 1911 or in April, 1911?

A. Well, I didn't go down there at all during my trip up here. I didn't visit the trap location at all when I came up here in April.

Q. I mean when after your trip up here—I mean 1911, Mr. Barron, when after that time did you see this place?

A. Oh; I went there with the surveyors to put the notices on the location there in August.

Q. You mean Dudley?

A. 1911. Dudley, I and Mr. Wettrick.

Q. Wettrick? A. Yes, Mr. Wettrick.

(Testimony of James T. Barron.)

Q. That is the same Mr. Dudley who testified in this case? A. Yes.

Q. Did you go there with him at the time that he said he posted up the notice? A. Yes.

Q. Well, then, did you see anything in the way of a fish-trap there that Alexander had constructed?

A. Yes; it was in operation.

Q. Did you see Alexander there? A. No.

Q. Who did you see?

A. I saw the boats there cleaning fish out of the trap.

Q. Now, you have seen this exhibit "E" of plaintiff's, which has [188] been testified about by Mr. Hill and, I believe, Mr. Dudley—Mr. Hill directly. How was the fish-trap, when you went there with Dudley, constructed in comparison with the way it is indicated on this exhibit?

A. Well, it was—the piles were run so far as that it was like the map there, I believe.

Q. Well, come up and look at the map and examine it and see.

A. Yes; it—while, of course, we didn't measure the distance while visiting the trap, but the trap was there and the web was fastened up to a shear, probably on above—a little above low-water mark, and the cable over high tide—here is the place on the ground.

Q. I wish you would explain to the Court, Mr. Barron, and take it slowly, just what Alexander had strung from the last pile in the lead, nearest the shore, up to this frame-work he had on the upland above the line of ordinary high tide. Explain to the

(Testimony of James T. Barron.)

Court how that thing was constructed and what use it was there for.

A. Well, the lead was a continuous web on a cable. I presume from the looks of the trap they drove the piles as far as they could possibly drive inshore. Then the web was extended in towards the beach on a cable hung there; dropped into low water into the ground along up here and fastened right here where—I don't know where fastened to, but fastened.

Q. Well, this little frame-work or cross timber it was—it was fastened?

A. A pair of shears, like that (indicating).

Q. Yes. Where was these cross timbers with respect to the line of ordinary high tide, as you remember?

A. Well, of course, the tide was close up there. It was in the water and, of course, I couldn't tell how far the beach ran down in the water. It was about half tide—well, a little [189] over half tide.

Q. Was this structure—this cross-timber to which this cable was attached—how was that with respect to the line of ordinary high tide? Was it above it or below it? A. Above high tide; above high tide.

Q. Well, how far with respect to the line of ordinary high tide, as you judged it was, from the beach there was the web strung on this cable?

A. Well, it was strung over—the web was over—above high-water mark at the shears.

Q. Clear up there? A. On the beach.

Q. I see. Well, now, Mr. Barron, you have had

(Testimony of James T. Barron.)

some experience in the—in the construction of fish-traps, haven't you? A. Yes.

Q. What has been your position with the Thlinket Packing Company outside there, besides president of the company, what active position, if any, have you been in for that company? A. Manager.

Q. How long?

A. Ever since we incorporated.

Q. And that is how many years?

A. Well, the same company incorporated. We changed the name of the company too, but ever since we started the Thlinket Packing Company. Ever since we—

Q. Well, when you came first to Alaska?

A. —ever since the business—

Q. Do you know?

A. Ten years; no, thirteen years.

Q. Thirteen years. Well, how long have you been using fish-traps in connection with this fishing plant?

[190] A. Since 1903.

Q. Have you had any supervision of the building and construction of—and maintaining of the fish-traps of this company during this time?

A. Well, by direction.

Q. Well, you have had the superintendency over them? A. Yes; that is men did the actual work.

Q. You didn't do the actual work? You have also, have you not, seen other fish-traps in Alaska and on Puget Sound?

A. Well, Puget Sound I have never had any experience, but Alaska I have seen quite a few.

(Testimony of James T. Barron.)

Q. Quite a few? Quite a few other than those used by your company? A. Yes.

Q. I will just ask you to explain to the Court what the ordinary way is of constructing a lead of a fish-trap with respect to extending it out to the shore.

Mr. CHENEY.—Object to that.

Q. (By Mr. WINN.) —upon which the same is located?

Mr. CHENEY.—Object to that for the reason it is immaterial. This case is just commenced. Counsel certainly can't introduce evidence now to dispute something that we testified to or tried to prove or did prove in the last trial of this case a year ago. It is a trial *de novo* now, and if this evidence is ever admissible it would be admissible in rebuttal. I don't know how it has any place in the direct case here as to what constitutes a fish-trap.

Mr. WINN.—We say this fish-trap was so constructed, your Honor, in the amended or supplemental pleadings to obstruct us. Now, I am going to show that they constructed it in a way always has been constructed. [191]

Mr. CHENEY.—That evidence has been put in here by Mr. Hill's exhibit and he has shown just the position of the trap as it is in front of the land which Mr. Barron claims. Now, he asks Mr. Barron what an ordinary fish-trap—how it is constructed. That can't add anything or aid the Court in any way. I don't see how it is competent.

COURT.—Seems to me, Judge Winn, just deals with this fish-trap.

(Testimony of James T. Barron.)

Mr. WINN.—All right, your Honor, with that view of it might be rebuttal. Well, I would insist, your Honor, on this phase of the case. It is material. I forgot to mention to your Honor, and you will bear with me if I do so. You see in our complaint we say that Alexander came into Court and got dissolved—this is part of the affirmative matter alleged in our complaint—came—he came in here and got dissolution of the temporary restraining order in this case, and among other things he testified they didn't construct the trap out to the shore line and he didn't intend to construct this out to the shore line. Now, I think, if the Court please, it is part of our record, inasmuch as the record states here there was once a temporary restraining order granted and then dissolved and I have put it in our pleadings, and I think it is very material because the granting of the temporary restraining order and then the dissolution of it might have a great deal to do with the decision of the Court on the merits of the case, and I was going on to show that we have got a different condition of affairs existing in this case and pleaded this. I believe it is good pleading too, I think, that is, your Honor.

COURT.—The question here, Judge Winn, is this: If you desire to impeach the testimony of the defendant that may be competent. [192]

Mr. WINN.—Yes, sir.

COURT.—But he hasn't put himself on as a witness yet and will be time when he comes on as a witness in case you desire to establish whether or not

(Testimony of James T. Barron.)

what he has done there is interfering with your access to navigability. Now, what he may have said on a former occasion isn't material at this time. The Court's granting or refusing a restraining order can't be of any moment here; whether the Court erred or whether the Court was misled by the witness' testimony is immaterial. This case will be tried out absolutely independently of anything that was shown on the former trial, except that it may be that some witness may be impeached for testimony he gave there if it becomes material; but at this time in your case in chief I can't see it makes any difference what Alexander testified to at the former trial.

Mr. WINN.—Well, I offer it—in view of that allegation of the complaint—I offer to substantiate that. If your Honor doesn't permit it to go in, I will reserve my exception, of course, that will save my record. I can't agree with your Honor on that.

COURT.—I am willing to allow the testimony of the plaintiff to take as wide a range as is consistent with any view of its materiality, but I can't see how other traps may have been built or how they ought to be built could aid the Court in determining whether or not this one is blocking your way to navigability.

Mr. WINN.—Yes, sir; I can't agree with your Honor, unless I thought might be an allegation for the reason that the injunction had been granted and dissolved, might be incumbent on me to show a different one, but in that view of it I pass on by that question. [193]

Q. Now, then, Mr. Barron, at the time you saw this

(Testimony of James T. Barron.)

trap constructed in the condition which you have just described, I believe, was it then that Mr. Dudley stated he was out there to put up some notice in the summer of 1911? A. Yes.

Q. Sometime in July or August?

A. In August.

Q. Wasn't it—August, 1911? Now, when after that did you next see the trap? A. This—

Q. Did you see it any time? A. This month.

Q. Oh, this month? A. This month.

Q. You didn't see it any time during the months of July and August, last year?

A. Oh, of course, when I was with Mr. Dudley to put up the notice.

Q. But I mean after that—after the Dudley trip?

A. No; I didn't see it.

Q. Well, you were not here at the time the hearing was had upon the application for a temporary restraining order nor wasn't here at the time that the motion was made for the dissolution of the temporary restraining order? A. No.

Q. Now, you saw this trap after August 11, 1911, at what date? A. I think March 10th or the 11th.

Q. Well, is that the time Hill went out there?

A. Yes.

Q. The time that Hill marked—he made the soundings?

A. Yes; but I was out there two or three days before. Just made a trip out there and looked at the piling. [194]

Q. Well, you was out there two or three days be-

(Testimony of James T. Barron.)

fore Hill made the trip? A. Yes.

Q. In this month? A. Yes.

Q. And then you was out there with Hill when he made the trip? A. Yes.

Q. Now, did you observe at the time the condition of the piling on the ground? A. Yes.

Q. Well, I wish you would look at Plaintiff's Exhibit "E" here and look at the piles, as they are indicated thereon and count them and say whether the pilings—the number of the crosses appears to be—that are driven—as put on this map, corresponds with what you found on the ground.

Mr. CHENEY.—Object to that, if the Court please, for the reason it is an attempt to put on a witness here now who isn't an expert, doesn't claim to be an expert, to testify to a map that they have put in evidence and after the testimony too by an expert, Mr. Hill, a surveyor, who has told how he made that map and how he indicated these black piles there. Now, we haven't put any evidence in; we haven't disputed Mr. Hill's map as being correct. I think that it just encumbers the record here, and I can't see how a witness, who isn't an expert, can add anything to Mr. Hill's. I make the objection because it is immaterial any way and it is encumbering the record with a lot of matter that hasn't been disputed. He is simply asking Mr. Barron now if Mr. Hill hasn't made his map correctly, but indicating what piles were there and the black piles and so forth he claims he located. We haven't put any evidence in and how can he [195] go on with this witness now on that map?

(Testimony of James T. Barron.)

COURT.—Well, if he has any evidence with reference to this map he must offer it as his case in chief. Can't split his case and put some of his evidence in chief and then some in rebuttal. If it is competent at all, now is the time to offer it. It seems to me it is competent, Mr. Cheney. He doesn't know whether you dispute that map, but if he has any evidence, whether by expert or not, to show that is a correct picture as he finds it, I think it is competent testimony.

Mr. CHENEY.—Well, it seems to me it is taking time on a matter that isn't necessary.

COURT.—Well, if you are willing to say to counsel now and you admit at this time that that map is correct and everything shown on there is absolutely in accordance with the physical features of the ground and also all the structures there, why then it isn't necessary.

Mr. CHENEY.—We don't admit that we don't intend to dispute Mr. Hill, and Mr. Barron certainly couldn't testify to the location of the piles.

Mr. WINN.—Oh, yes; he does. He was there and counted them.

COURT.—He may answer.

A. Well, I counted them and I don't think, south of a point as far as could drive, any of the piles that was missing with the exception of one of the fifteen. I think the third pile from the inshore lead was missing there and it is in that map. That is the only error in the map. Of course, I know the shape of a trap as well as its position.

(Testimony of James T. Barron.)

Q. (By Mr. WINN.) Yes, sir.

A. Yes, sir; and I can tell when a trap is constructed and when it is partly constructed; whether a pile is gone that should be there. [196]

Q. Yes; then, as I understand, you think Mr. Hill indicated upon this plat here some piles had been put here were out when he was out there? A. Yes.

Q. Well, now, just indicate to the Court, and come over here to the map and plat, and tell what piles you indicated to Mr. Hill were out you had seen there before.

A. Well, this part of the heart—that pile is missing here, and here there was one pile missing there in the upper spiller, and this here—this pile should be the opposite of it—should be a pile, missing there.

Q. Is that the last end pile?

A. The last end pile. Is this the last end pile?

Q. The last end pile? A. Yes.

Q. Was out? A. But I think one pile in here.

Q. The end pile of the lead—was it the end pile?

A. Oh, yes, I think it was the third, if I am not mistaken.

Q. Have you any—I withdraw that—did you count the number of piles that were in the water, driven there, standing there, when you and Hill were there, Mr. Barron? A. Yes.

Q. Have you counted them on this map or plat?

A. No; I forget the number there, except I think that one pile was out in the lead that wasn't in the trap when we saw it.

Q. Now, now, did you assist Hill in making

(Testimony of James T. Barron.)

any soundings there? A. Yes; along the lead.

Q. Along the lead. Well, indicate what soundings that you helped to make while—helped Hill to make as indicated on this plat. [197]

A. Right along the lead here; I sounded here.

Q. Now, what are the numbers there, do you remember?

A. Well, there is 39, 30, 24, 24, 16, 16, 10, 8.

Q. Now, when you saw that trap, Mr. Barron, in 1911, how was its construction in respect to your testimony that you have just given concerning the conditions that you saw there when you was out this month with Hill? A. It was almost intact.

Q. Almost intact. Now, Mr. Barron, have you—I withdraw that question—have you had under your superintendency as superintendent of the cannery gasoline boats or steamers and had any experience in going in and out of the harbor, and so on, with steamers? A. Yes.

Q. Now, I will ask you, Mr. Barron, the way that this fish-trap was fishing when you was out there in last August as to whether or not that that trap cut off or obstructed your entrance from the deep water of Chatham Straits in to the ground contained in this survey 804? A. Yes.

Mr. JENNINGS.—We object, I think that is a conclusion.

COURT.—Yes; but I think that is probably true, Mr. Jennings, is a conclusion, but the accuracy of the statement of the witness can be gone into on cross-examination.

(Testimony of James T. Barron.)

Q. (By Mr. WINN.) Now, Mr. Barron, I will ask you if you have ever been up and down the shore of Admiralty Island, upon which this ground is situated, at the time when a north or westerly wind was blowing? A. Yes.

Q. I will ask you to explain to the Court from what winds this [198] harbor is sheltered?

A. The north and east.

Q. You heard Mr. Hill's testimony when he was on the witness-stand, didn't you? A. Yes.

Q. You heard about his saying about one day when he went over there, there was a strong wind blowing, and so forth. Now, was you with him that day?

A. Yes.

Q. Now, I will ask you to explain to the Court the condition of the wind and the water and the weather out in Chatham Straits and the condition of it that day in this harbor?

A. Well, it was blowing a gale—what you might call a gale—out in the channel and there it was quiet and calm, with the exception of the wind blowing, of course, over the water, but not like that. Coming down and sweeping down the hillsides would naturally create somewhat of a breeze, but not very much and there were big swells and white caps outside.

Q. How, is the protection of that little harbor in there from the south winds, Mr. Barron?

A. Well, it is pretty well protected from the south winds; direct south winds.

Q. What winds is it not protected from?

(Testimony of James T. Barron.)

A. Southwest and southeast.

Q. Southwest and southeast. What time of the year, Mr. Barron, do you do the most of the towing of your piles for the purpose of building and constructing your traps for any one season?

A. Early spring.

Q. What do you mean by early spring?

A. Well, March. [199]

Q. This month? A. Sometimes April. Yes.

Q. How are the prevailing winds out there on Chatham Straits, right along in the vicinity of this harbor, during the period which you do the most of your towing?

A. Well, we have a great deal of north wind.

Q. I believe you said that this harbor was a protection— A. Yes.

Q. —against north winds? A. Yes.

Q. When did you first become acquainted with Alexander? A. Think I met him in 1908.

Q. What was he doing then?

A. He had charge of the trap for the Alaska Packers' Association.

Q. Did you ever have any conversation with him about his taking possession of this ground out there and putting this trap in? A. No.

Mr. CHENEY.—No. Alexander is it?

Q. (By Mr. WINN.) Yes. You never had any conversation with him? A. No.

Q. Now, Mr. Barron, I will ask you from your experience you have had with these cannery steamers and around on them, suppose that this man Alex-

(Testimony of James T. Barron.)

ander had only constructed his trap with the pots and fillers (spillers), and so forth, as they are indicated upon this exhibit "E" and extended his lead up to where he had it when the temporary restraining order in this case was dissolved, being the little cluster of piles just opposite the words on this plat "Barron's piles," now cut off—I will ask you as to whether or not a structure of that kind would obstruct the entrance of steamers the size of the "Anna Barron," "Georgia" or other steamers that may go [200] in there, from the entrance to this harbor and the upland?

Mr. JENNINGS.—Just, wait a minute.

Mr. WINN.—He withdraws his objection.

WITNESS.—Why, I thought—

Mr. JENNINGS.—He just asked this witness—

WITNESS.—I have forgot the question.

Q. (By Mr. WINN.) Well, I will put it in this shape, Mr. Barron. Suppose that Alexander's trap— A. Oh, yes; I remember now.

Q. —was in the condition that he testified it was at the time the temporary restraining order in this case was dissolved?

A. It would be quite dangerous to go through there at times, especially when the tide or the winds were blowing. It would be almost impossible and to—to do it with safety if there was a wind blowing there.

Q. Well, you have seen the "Anna Barron" with a tow of piles? A. Yes.

Q. Well, even if they constructed it like he had it

(Testimony of James T. Barron.)

there, would it have been possible for her to go in and anchor with this structure fastened as it was when this other case was tried?

A. Impossible without knocking some structure down with the swinging of the raft.

Q. I will ask you, Mr. Barron, if you have had experience enough to observe when going in in the night-time to this harbor, or any harbor for that, as to whether or not the shade from the upper hills, and so forth, has any effect upon your ability to see a structure like a trap? A. Yes.

Mr. CHENEY.—Object to that for the reason it isn't confined to this particular spot.

Mr. WINN.—I will confine it. [201]

COURT.—He may answer.

Q. (By Mr. WINN.) Now, you know the contour of the ground above this little harbor down there, do you not? A. Yes.

Q. Well, now, Mr. Barron, what would you say—suppose a steamer was seeking shelter in there out of a storm or even was just going in there at night to anchor, in the night-time, ordinary night, not a moonlight night, what would you say about the ability of the officers of the steamer to see this trap before they got right on top of it?

A. Well, it would be very hard. The shadow of the hill—the mountains throw a shadow over the water and it would be almost impossible to see a trap until you got on to it some particular nights; on a moonlight night or where the reflection was against the mountain from the water, why you can

(Testimony of James T. Barron.)

see plainly but when the shadow is thrown over the water it looks like a pocket.

Q. What would you say about the utility of this harbor and about the accessibility of reaching your upland there if this trap is permitted to remain in there as it was constructed by Alexander or finished by him?

A. Well, it would be dangerous. I couldn't go in with the "Anna Barron" and anchor there. I might do that if there was no tides and no winds and daylight.

Q. Well, you would be—

A. Everything calm, but I wouldn't dare to go in there with her with the tides or the wind blowing.

Q. Well, how would it be to go in there with a tow of logs any time?

A. Couldn't possibly get in there without striking the trap with the swing of the raft. [202]

Q. Now, Mr. Barron, there has been some question about the scrip in this case, while I don't consider it material, I will ask you a question if the Court thinks it material and counsel don't object to it. Did you purchase the scrip that has been testified about in this case to cover that ground?

A. Yes.

Q. I will ask you, Mr. Barron, if anything should turn out that this scrip isn't good or the amount is not in Washington as to whether or not you expect to go ahead and patent this upland? A. Yes.

Mr. CHENEY.—I object to that, if the Court please.

(Testimony of James T. Barron.)

Mr. WINN.—I don't know as it is material. Under some of these decisions, your Honor, it is material.

COURT.—I don't appreciate its materiality, but he may answer.

Mr. WINN.—I don't know either, your Honor. He has answered. He said, "Yes, sir."

Q. Just a minute. Oh, I may ask you, Mr. Barron,—I will ask you, Mr. Barron, if you were out to this ground at the day Mr. Hill made his soundings and remained there all the time Hill was there?

A. Yes.

Q. But you didn't help him make any soundings except the soundings along the lead line as you testified concerning? A. No.

Q. Well, now, did you stay there until the low tide, March tide, until the tide was out?

A. Not quite out. I think it was an hour before low water before we got through.

Q. Did you go out where he made the sounding at the last pile [203] nearest the shore?

A. Yes.

Q. Nearest the shore? A. Yes.

Q. You saw that sounding made? A. Yes.

Q. Well, now, did you—you don't remember the depth at that point? A. Eight feet, I believe.

Q. Yes. Did you take any measurements or observe approximately the distance it was from that last pile in the lead to where tide land was?

A. Well, it looked to be about 150 feet, but we

(Testimony of James T. Barron.)
measured it out—it was 140.

Q. Yes. A. Some bedrock out there—a point.

Q. I did ask you if there was any chance, Mr. Barron, even though there was no web ever been strung between that last pile and the upland, for any size of gasoline boats, or any other boats, to navigate between the upland and that pile at ordinary low tide?

A. No; a small gasoline boat could go there. Three big boulders there, probably three or four feet along, high; they entirely close up along in between, entirely; along the shore line might get a depth of, say, four or five feet and get on top of a boulder and you would have three or four or five feet less of water.

Q. I understand. When you was out there at ordinary low tide that was entirely closed up from that pile clear on up to the ordinary line of high tide?

A. Yes.

Q. No chance of getting through there unless you run through [204] his trap? A. No.

Q. There has been some little testimony, Mr. Barron, here about the beach and shore line, I believe, along the waterfront of this survey of yours. I wish you would, just as you remember it, would minutely—not minutely but generally describe to the Court how this shore line along the survey is with respect— A. Well, it is marked bluff there.

Q. Yes.

A. There is a space here, I don't know how many feet, maybe 50 to 75 or 100 feet here; that is just a little beach here; this is very high between; doesn't

(Testimony of James T. Barron.)

run very level right along through here.

Q. Give it entirely along there, only commenced on the eastward? A. On the westward?

Q. On the westward side.

A. Yes; northwest corner, here is a pretty fair beach; of course, the beach between high and low water is rocky and the wash of the tide has taken out sand and thrown it on top of the high-water mark along there, and here is a place here, and it is more level down on this end than up here.

Q. Where is the natural landing place, Mr. Barron, and the place for mooring and—

A. Well, I should think right here, about opposite the cabin in here.

Q. Opposite the cabin on the westerly—

A. Where is the cabin—about here—and—

Q. On or near the westerly side line of the survey?

A. Yes; about one-third nearer to the northwest corner of the plat.

Q. Yes. [205]

A. Of course; all this could be—I suppose from here to there about 300 feet.

Q. There is about three or four hundred feet. Near the westerly end line?

A. Northwest corner.

Q. Yes; of your claim and that would be a place for landing, and so forth? A. Yes.

Q. Explain to the Court why that is so.

A. Well, because between this and the lead line it is more of a level beach here, and besides I wish to put buildings or anything on there could do it easier

(Testimony of James T. Barron.)

for them to build, and also running off out here you would have a feasible way and then you have got your—what else do you wish?

Q. That is, just explain to the Court why you think that is the best place either for landing or wharfing or anything of that kind or reaching your upland. Now, I will ask you, Mr. Barron, should a wharf be built out from any part of the water front to this piece of property of yours as to whether or not this trap, as constructed by Alexander, would be an obstruction in the way of getting to that wharf to effect a landing, to reach your upland?

A. It would.

Q. Well, explain to the Court how that would be.

Mr. JENNINGS.—Just a moment. Interpose an objection to that question as the witness is not shown to be qualified to express an opinion; in the second place, it is only an opinion; in the third place, it is purely a conclusion.

Mr. WINN.—Well, I will qualify the witness, your Honor.

Q. Have you had anything to do with building of wharfs or landing places in your fish business?

A. Well, by direction. [206]

Q. That is you directed the work to be done?

A. Yes.

Q. You oversee it? A. Yes.

Q. You have had some experience in that, Mr. Barron? A. Yes.

Q. Well, I will ask you in the event that you wanted to facilitate your landing at this upland of

(Testimony of James T. Barron.)

yours and wanted to wharf out and put a structure in there, or float, or anything of that kind, as to whether or not this—that this trap, as constructed by Alexander, would prevent you from so doing?

A. Yes.

Q. Well, will you explain to the Court, Mr. Barron?

A. Because we would have no room to land. When a boat goes into a wharf or float they have to maneuver to turn around and to get around have to have steerage-way; so, on a compass in there wouldn't have steerage-way if it should blow or the tide was high, send her on the beach. Hard any way to control a boat. She must have steerage-way, so to answer her steering gear; otherwise, she would be helpless.

Q. What length is the "Anna Barron"?

A. About ninety feet.

Q. About ninety feet. You have never been master of her yourself? A. No.

Q. What is the size—the length of the "Kodat," the other boat in use for towing?

A. I think she is fifty-four feet.

Q. Do you remember how much water the "Anna Barron" draws?

A. About between eight and a half and nine feet.

Q. Is that when she is light or loaded?

A. Well, I suppose when she has got her fuel in her and water, and so forth, I suppose she will go eight and a half or nine [207] feet anyhow.

Q. Do you remember the draft of the "Kodat"?

(Testimony of James T. Barron.)

A. Well, I think she will draw something like six feet.

Q. In giving your testimony, Mr. Barron, you have gone over these maps and plats and measurements with Lloyd Hill? A. Yes.

Q. Do you know the distances out there?

A. Yes; by referring to the map.

Q. You know the approximate distance between the heart and filler (spiller) of Alexander's trap and the reef and the—and the peninsula? A. Yes.

Q. And you know also the approximate distance between this lead line of the trap and the—and the side lines or prolongation of the side lines of the survey? A. Yes.

Q. You heard Hill's testimony and have gone over that with him? A. Yes.

Q. Side lines, I say. To the end lines. Put that statement "end lines, prolongation to the end lines of the survey," Mr. Robertson. Side lines would be different entirely. I think you can cross-examine.

Cross-examination.

Q. (By Mr. CHENEY.) Mr. Barron, you talked about the condition of that place you call a harbor there in the night-time. When were you in there, run in there in the night-time, in the dark?

A. Well, it was a matter of knowing the conditions beyond there. I was never in the night-time there myself.

Q. You are just giving that as your opinion?

[208]

A. Knowing it, Mr. Cheney, in those bays; observa-

(Testimony of James T. Barron.)

tion of the topography of the whole country at different places.

Q. Different places, yes. Now, you spoke about getting your piles for your fish-traps for the Thlinket Packing Company at Funter Bay. You have bought piles from this man that has a homestead over on Shelter Island, haven't you, way around this side of Point Retreat? A. No.

Q. Never buy any piles of him at all?

A. Oh, you mean there. Yes; I bought them in 1903 and 4, I think it was, but not in late years. I think it was—I think 1904, 3 or 4 was the last time I ever bought any piles on Sullivan Island, near Sullivan Island.

Q. Yes; and here on Shelter Island; Portland Island? A. No; I don't think so.

Q. Where this Finland laborer has lived, who is over there—he has sold you piles, hasn't he?

A. No; not that I know of.

Q. Now, you say that Captain Crockett said that he used to run into this little place sometimes, didn't you? A. Yes.

Q. You know he used to run in. You haven't been there but only just the times you have mentioned to Judge Winn, have you? You wasn't down there in 1911 only just once, that was in August, I believe you said?

A. Yes, I think—let me see—I don't remember now. I think that is the only time I was there.

Q. Yes. You weren't there—

A. I don't remember of being there any other time.

(Testimony of James T. Barron.)

Q. You weren't there in 1909 when there was no trap there at all, were you?

A. Oh, passed down there. [209]

Q. I mean you didn't go in there to examine it and look at it? A. No.

Q. To see whether it was a harbor or not?

A. No.

Q. Now, this Fresh Water Bay you are talking about is on Chicagoff Island? A. Yes.

Q. Clear across Chatham Straits from Admiralty Island? A. Yes.

Q. Well, do you mean that it was—that you gave orders for men bringing piles from Fresh Water Bay, way over on Chicagoff Island, to always stop in at this little harbor with the piles on their way home?

A. No.

Q. No. Hawk Inlet is a pretty good harbor, isn't it? A. Very fair; yes.

Q. Yes; that is a good harbor and did you give orders for them to stop in there with the piles on the way home? A. If in a storm.

Q. Well, any man coming in a storm would go in the best harbor he could find? A. Yes.

Q. Any port he could find. You don't mean to tell this Court you have been in the habit of using this place and have been for several years as a particular harbor for your own boats, do you?

A. No; but we have used it occasionally, when occasion required.

Q. Yes; so did all the fishermen in the country?

A. I suppose so.

(Testimony of James T. Barron.)

Q. The same as they would at any other place it happened to be coming along there and happened to be a bad wind from the north, might come along that lee shore? [210] A. Certainly.

Q. If a southeastern blowing they wouldn't go in there?

A. With us wouldn't need to because blows right into our bay.

Q. Well, I say if a southeaster was blowing a man wouldn't go in there for protection?

A. No; but we wouldn't need to.

Q. If a wind blowing across Chatham Straits, a west wind?

A. No; would have to; go right into our bay, cross over from Icy Straits; wouldn't be necessary to go in.

Q. Or if a man was coming up Chatham Straits with a tow of logs and didn't find a harbor he would be more apt to go into Hawk Inlet, just right close up there, than this little point, wouldn't he?

A. Well, I don't know. The north wind dies out down there at Point Augustine and it hasn't the velocity it has up along that place, and you go along that shore in an ordinary north wind and get as far as this harbor and stop there. It is a well-known fact that a north wind has no effect south of Point Augustine.

Q. Now, you told the Court this was protected from the north wind and the east wind, I understand? A. Yes.

Q. The east wind comes on from the direction of the east line of your homestead claim? A. Yes.

(Testimony of James T. Barron.)

Q. That is—if so, if it is protected from the east wind, the protection is just as good, if not better, on the east end of your claim as it is on the west end of this claim at this little reef? A. Say it again.

Q. Why, an east wind blows there you say this harbor is protected [211] from an east wind to a certain extent, I say the protection would be better over on the east end of the claim than it would be over on the west end if an east wind blows?

A. I don't think so.

Q. Why not?

A. The east wind—this is it—well, the mountain range gives protection to it from the south wind and the east, and it is protected by the east—being east of the—

Q. Well, yes, then I say— A. —shore.

Q. I say if it is protected from the east wind and the wind is blowing from the east that protection must be better over to the east end of your claim than it is over to the west end, over next to the reef?

A. Well, I don't think so; I don't think so.

Q. Well, if—if it is protected from a north wind, we will say a straight north wind blowing like everything, like they do over there, the protection is better right next to the beach than further out?

A. Further out; why, certainly, than further out.

Q. Yes, certainly. Well, if protected from an east wind, isn't the protection better the further you go to the east than over to the west end?

A. Well, the east wind have—the mountains shelter from an east wind.

(Testimony of James T. Barron.)

Q. And if you go further off, over east, the protection is better?

A. Well, between those two points, I don't know; might be.

Q. Would you say it would be just as good?

Q. (By Mr. JENNINGS.) Well, between which two points, Mr. Barron?

A. I don't exactly know where—what point counsel were asking.

Q. Here you are.

A. Now, this runs south. Now, this east. The line would be east you say? [212]

Q. You say between two certain points it would be just the same. What two points do you mean?

A. Well, I suppose the two points of the survey. I suppose no difference.

Q. Just about the same?

A. I should think so—I don't think very much difference between an east wind—between these two points. So little, I don't *think make* any difference.

Mr. WINN.—I don't care if both examine.

Mr. JENNINGS.—Just want to know what he is talking about there.

Q. You mean from that end of the survey to this end of the survey would be just about the same?

A. I don't think would be very much difference.

Q. Those two points, that is, what you mean—from the east end to the west end of the survey?

A. Because the east wind has very little effect on it anyhow.

Q. (By Mr. CHENEY.) I will ask you this, Mr.

(Testimony of James T. Barron.)

Barron. I don't know as you have been there with boats, and so on, or not, but I will ask you any way. That this survey, just as it is there, isn't it a fact that the water is calmer and stiller and better over any of this section around in here in front of this survey with an east wind blowing than it is over in here? Isn't this water, on account of the extreme heavy and swift tides that come across Chatham Straits from Icy Straits, or come around this point and swerve in here, isn't this more liable to be rougher than over here?

A. Well, I couldn't judge; couldn't say that; but I couldn't say that would be very much difference in the short distance.

Q. You haven't noticed that yourself?

A. No, never noticed it.

Q. You haven't landed in here with a small boat in front of [213] this survey and taken occasion to notice?

A. Once in a while I have a small boat around there, but I never had particularly to experience—

Q. Experience. You do know though, as a matter of fact, there is a heavy tide comes across Chatham Straits and runs around this point?

A. Yes.

Q. And there is a low point in front, expires there, and isn't it a fact that little of that incoming swell gets around this little bight here on this point?

A. I don't know; never noticed that.

Q. You haven't been there to notice. Now, Mr. Barron, have you ever—have you ever looked at a

(Testimony of James T. Barron.)

large map of that section of the country and noticed this little spot there on the map, where your survey is, to see whether it looks like a harbor or not? Have you ever noticed it on a large map? That map there is cut off. Funter Bay and Hawk Inlet are a little way— A. Yes.

Q. Have you ever noticed it on a large map that shows the whole thing?

A. Well, there is a map, probably there that I have —have—it is a smaller scale than this. Shows the whole of Admiralty Island, I think, and I have noticed it casually, but I haven't made no particular study.

Q. Well, as a matter of fact, Mr. Barron, during the whole—the whole summer season the prevailing winds are not from the north, are they, during the summer season?

A. Well, there has been last summer, quite a lot of north winds.

Q. Well, but what is the prevailing winds?

A. Southeast winds generally.

Q. Southeast winds. And this isn't a harbor for the southeast [214] wind?

A. No; not a very good harbor for a southeast wind, but from the evidence you see there in the trap, so slightly built, the structure is almost—indicates—shows not very rough weather in there or that trap wouldn't have stood it. It is a lighter constructed trap than any of ours.

Q. You say it would be dangerous to go into that—what you call the sandy beach there—with the "Anna

(Testimony of James T. Barron.)

Barron" when you have 361 feet of navigable water?

A. Yes; dangerous.

Q. Between the point and the trap?

A. Dangerous with the tide.

Q. What?

A. Yes; dangerous—the tide sweeps in there.

Q. Against the tide. Suppose there is a flood tide around that point? A. Yes.

Q. We all agree upon that.

A. No; stops her steerage way with the tide in there—just loses her control, and travels three or four hundred feet before you can back there very well.

Q. As a matter of fact, down in Seattle they have a lot of wharves where the boats never lay alongside, just come right in with their tows and back out?

A. Oh, yes.

Q. Lots of them that way? A. Yes.

Q. Wouldn't be any difficulty at all in the "Anna Barron" going in there? Wouldn't go on the beach anyhow?

A. Yes; if have a good strong wharf to tie to. If a current comes on the outside of the dock, get a line ashore and check the boat. [215]

Q. Now, if the "Anna Barron" did go on there and dock in close up to this sandy beach, wouldn't draw any more or less than if not tied to a dock?

A. I suppose not.

Q. You suppose not. But she would come in there if no wharf there or no trap there or anything else—wouldn't come on very far past that point?

(Testimony of James T. Barron.)

A. Well, have to go in there to get into the harbor.

Mr. WINN.—Now, what point? If you don't understand the question, don't answer. I don't know what counsel is talking about.

Q. (By Mr. CHENEY.) Only one point.

A. You mean in from the reef?

Q. Yes, where the reef is there.

A. Between the reef and the pot and spiller?

Q. Yes. I say if she draws nine feet of water she wouldn't come in there any farther than about where you have marked, say, where Mr. Hill has marked here "about twelve feet" or something like that—up in here?

A. She wouldn't come any farther.

Q. She wouldn't come any farther; no.

A. She couldn't go any farther.

Q. Well, if you have—well we will say—330 feet of water that is over 13½ feet deep at any tide between there and this reef, you say it wouldn't be safe for the "Anna Barron" to come in here and anchor?

Mr. WINN.—Now, if the Court please, I object to this as incompetent, irrelevant and immaterial, We are simply protecting our waterfront; not somebody else's. There is only 150 feet between the prolongation of our property and this line—and this outer station. He can't, if your [216] Honor please, and your Honor can't in rendering the decision in this case, say we will go up across out here and use this land out here as a harbor somewhere else. Simply protecting our rights to our own waterfront. Of course, as to his owning it—it might be an ex-

(Testimony of James T. Barron.)

pert question—I don't know, but the distance between these two points is 150 feet. Now, he said 300 feet. I don't know what that ground is. It isn't ours. We are talking about simply going on our own property and I don't think it in line, your Honor, with our own proposition.

COURT.—Well, I have ruled on that matter already in another case, but anyhow it is competent here. I have ruled in the Katalla case, in which you are co-counsel, if you have any access to use you may take it whether it is—whether you take it at an oblique angle from your property or at right angles so long as you can get out. I have held in that case there, in the case of the Katalla Company against Low, that was what was considered access by our appellate court and I am still of the opinion that is correct.

Mr. WINN.—But going in front of other people's land, your Honor.

COURT.—No question—isn't going in front of other people's land. The question is for you to show that they prevent you from getting in. Now, if they show you can get in easily and with reasonable access, it doesn't make any difference where you come in.

Mr. WINN.—I didn't know your Honor held that way. He didn't intimate from the shore there. I thought at least that your Honor's decision had confined it specifically to the waters out in front of the waterfront to our land. Now, of course, somebody else could get this whole upland and then absolutely come in and shut us off. [217]

(Testimony of James T. Barron.)

COURT.—That question did arise. The New York courts have said when that arises they will determine it, but you are asking now for relief from a structure which you say he is maintaining and obstructing your access to deep water. Now, in my view of the matter in this case—I am considering now the question of access—they have a right to go on there so long as they give you and you have a reasonable access to your property. I am satisfied that is the law. I so held in the Katalla case and I don't think any little thing in this case could change my mind, because it is based on the ruling of the appellate court in the Decker case.

Mr. WINN.—That is whether go over other people's waterfront or your own waterfront, or not?

COURT.—Yes.

Mr. WINN.—Your Honor will allow me an exception.

COURT.—Yes. I don't mean to say in this case may not some other issues arise. If that is the objection you have now to the admission of this evidence, the objection may be overruled.

Mr. WINN.—Of course, the contention we make: We have got to have free access to our property from the water in front of our own property because we don't know what our neighbors are going to do; can't go in front of our neighbors, for he may do something to prevent us doing that. So, I think in this case we will stand upon the theory that they are obstructing our free access over and in front of our property, because we don't know what there is above

(Testimony of James T. Barron.)

or below us. If any waterfront property, either below or above us, could entirely shut us out from getting into our upland in that manner. That is the theory we take that we could wharf out over any water in front of our land and not trespass upon [218] somebody else's rights in order to reach it there, and they couldn't force us to trespass.

Mr. JENNINGS.—In the first place, haven't shown anybody owned any.

COURT.—If the evidence should show you were obstructed from taking any other course by anybody else, then I would be *included* to agree with you. Unless that is shown, I don't think that is the law. Objection overruled. In any event the evidence may be admitted.

Mr. WINN.—Exception.

Q. (By Mr. CHENEY.) I will ask you the question again. Now, Mr. Barron, I want to know if you intend to swear that it would be unsafe for the "Anna Barron," which you say draws 8½ or 9 feet of water, to come into the harbor here for a place for anchorage between the trap—between this point and the reef?

Mr. WINN.—Now, what point?

Mr. CHENEY.—Well, this point.

Mr. WINN.—Well, it is marked there.

Mr. CHENEY.—Well, it is marked "bare rock" and the reef is marked "reef" and so forth.

Mr. JENNINGS.—Alexander's trap is marked "Alexander's trap."

Q. (By Mr. CHENEY.) Here is 342 feet of open,

(Testimony of James T. Barron.)

navigable water that in the shallowest place on this map is 13½ feet deep at low tide and being very much deeper over here, say 40, 39 or 40 feet of water, —that it would be unsafe for the "Anna Barron" to come in? A. It would be.

Mr. WINN.—Now, wait before you answer this, Mr. Barron. Now, if your Honor please, we object to this question for the reason it is incompetent, irrelevant and immaterial for any purpose of this case whatever; and then if it is understood [219] in this case, so as to prevent further objection, that I object to any and all questions on cross-examination of this witness pertaining to the ability to enter and reach the upland of survey 804, unless that examination is confined to our traveling within the limits of our rights, that is to say, that we are seeking to enter and reach by use of that water—we are seeking to enter the harbor and reach the upland by reason of coming in and over the waters immediately in front of survey No. 804 and that would mean the waters and frontage that is embraced between the prolongation of the end lines of this survey, as is indicated on this exhibit "E" that—that is the only right of way that we have under the law out to deep water, that is over the water that is immediately in front of our own property; that we couldn't be held accountable for the rights of others that may hold on land adjoining ours; and for that purpose, I say the evidence is incompetent, irrelevant and immaterial for any purpose in this case and so without objecting to it each time, so far as this witness is concerned, we

(Testimony of James T. Barron.)

would ask, if your Honor please, that it be considered. That is all right, isn't it, without making a specific objection.

Mr. CHENEY.—Oh, yes, I guess so.

Mr. WINN.—I mean don't have to state the specific question.

COURT.—Well, it will—

Mr. WINN.—You may go on the other way.

COURT.—I think it is well the objection should go to all that character of testimony. It will save the record and expedite the case, I believe. The objection may be overruled with that understanding.

WITNESS.—Just repeat that once more.

Q. (By Mr. CHENEY.) I will have to ask the Reporter to read it [220] to you because I have stated it just the way I want it. He will read it to you.

Q. (Read by the Reporter.) Here is 342 feet of open, navigable water that in the shallowest place on this map is 13½ feet deep at low tide and being very much deeper over here, say 40, 39 or 40 feet of water,—that it would be unsafe for the "Anna Barron" to come in?

Q. (By the COURT.) Do you understand the question?

A. It would be unsafe if there was a fierce tide running like there is around that point and the wind blowing—it would be very unsafe, and it would be impossible to go in there with a tow of logs without the total destruction of the obstruction, the trap. To anchor would have to use about five or six times the

(Testimony of James T. Barron.)

length of the boat just to swing there or hit the point, and then of course have to do it with a nicety and be able to have the conditions with you favorable, so be perfectly safe; otherwise it would be unsafe.

Q. (By Mr. CHENEY.) Now, Mr. Barron, you say if a strong wind was blowing. What kind of a wind? A. I said southeast wind.

Q. Southeast wind? Well, if a southeast wind was blowing you wouldn't go in there at all for anchorage whether any trap there or not?

A. Well—

Q. Answer the question. Would you go in there with a strong southeast wind blowing, when any kind of a wind was blowing, for anchorage at this place?

A. Not unless had that for a wharf and no obstruction.

Q. If you had a wharf there?

A. Could go if a wharf there and tie to the wharf.

Q. You haven't got a wharf there, have you? There isn't any wharf there? [221]

Q. No; but then I say if there was a wharf there you wouldn't go in a tow of logs because the wharf would be just as bad as the trap?

A. No; the wharf would be stronger than the trap.

Q. Yes, but the trap would be just as apt to hit—

Mr. WINN.—Let him answer.

COURT.—Let him answer.

Q. (By Mr. CHENEY.) I say if you did go in with a tow of logs just as apt to swing around the wharf as a trap if both in the same place?

(Testimony of James T. Barron.)

A. Oh, no; seen tows the tide would swing them around.

Q. What is it?

A. Oh, no; seen tows the tide would swing them around.

Q. Yes; yes, but I asked you this question: When there is a strong gale or southeast wind blowing you wouldn't go in there for anchorage with any kind of a boat at any time?

A. I don't know; if I should build a wharf there for purposes, could make that a station, I would want to go in there with any kind of a wind.

Q. You don't answer the question. There is no wharf there now?

A. I can't go there now on account of the trap.

Q. Suppose, Mr. Barron, there was no fish-trap there, nor any wharf either, then I ask you would you go in there— A. Well, I have no business.

Q. —with the "Anna Barron" or any other boat with a strong gale of wind blowing there?

A. I have no business there at all if nothing there.

Q. That isn't answering the question. Would you go to anchor there at all, Mr. Barron, with a southeast wind blowing?

A. If I had no business, of course, I wouldn't go in there.

Q. Do you consider it a safe anchorage to go in there with a [222] southeast wind blowing?

A. No; but if I had a wharf there be all right.

Q. If you had a wharf? But I say if there isn't any wharf, do you consider that a safe harbor to go

(Testimony of James T. Barron.)

into with a wind blowing from the southeast?

A. No; not without a wharf; no.

Q. And with a southeaster blowing you wouldn't consider it a safe anchorage?

A. With a wharf; not without a wharf, no.

Q. I suppose the harbor would be a whole lot better with a wharf there? A. No.

Q. Less wind? A. Oh, nothing, no.

Q. Something to tie to? A. Yes.

Q. If you had a wharf at just where Mr. Alexander's trap is on this map and you were coming in with a tow of logs and wanted to rest on your way home with a tow of logs, would you go in there?

A. I wouldn't have to go quite so far as your heart and spiller is.

Q. You wouldn't have to go that far?

A. No. You couldn't maneuver in that, between the trap and the cove with a strong tide no matter whether any wind at all.

Q. No?

A. You couldn't maneuver in there and get around. You would be obliged to get on top of the trap or on the beach.

Q. Pretty strong current comes right around this beach? A. Yes.

Q. You could get in there any time?

A. If the trap was out of the way. [223]

Q. Over to this east end line?

A. No, the trap is there. The current sweeps you around.

Q. I am not asking about this, coming in the way

(Testimony of James T. Barron.)

the visible line somebody has put on the plat. No line on the water?

A. No; but can't go over anybody else's.

Q. Well, it is better over here?

A. Too deep to get anchorage.

Q. Mr. Barron, do you know anything about the bottom of this ground down there in front of this survey? A. I do.

Q. Well, let me ask you: isn't it a fact that it shelves off into deeper water where Mr.—east of Mr. Alexander's trap? A. Yes, sir.

Q. And isn't it a fact you could come in here pretty near any old time with the "Anna Barron," either come in this direction, up in this direction or this direction, could come in front of that survey at any time?

Mr. WINN.—If he would indicate so it will show on the record.

Mr. CHENEY.—I am not making a record.

COURT.—The only difficulty, Mr. Cheney, would be that the record won't mean anything.

Q. (By Mr. CHENEY.) Then, I will ask you, Mr. Barron, if you couldn't come in with the "Anna Barron"—if there would be anything to obstruct or interfere with the "Anna Barron's" coming in here in front of your homestead claim 804–B on the east end of the claim, in front of the eastern end of the claim?

A. She could come in there, but she would have to go outside the frontage to anchor, and if she came there, if the tide was sweeping in here, have to go

(Testimony of James T. Barron.)

clear out, probably, from that trap possibly 350 or 400 feet to anchor safely without [224] striking the trap, to give scope to the anchor. The trend of the tide here is—

Q. (By Mr. WINN.) Now, how did you say the trend of the tide? A. —sweep in there.

Q. Well, now they would sweep in from which side? If you will indicate?

A. From the southeast side.

Q. From Chatham Straits. Sweep in from Chatham Straits on the southeast side?

A. Well, it is—it sweeps in here and certainly from the tide-book runs about down here and a strong—what you call a strong flood tide—the flood tide comes in there. You have to go close out to 50 fathoms, 11 fathoms, but out here the deep water is you couldn't do that; your logs would swing; you would have to have about 700 or 800 feet.

Q. I didn't ask about any logs.

A. Even with a steamer have to go close to 11 fathoms of water at least. The chain will ride her 50 feet; the scope of your chain would have to be about six times it, that is about 500 feet of chain have to put out.

Q. (By Mr. CHENEY.) I will ask you the question again, Mr. Barron. You didn't answer it. I ask you now if there is anything to obstruct the "Anna Barron" coming in to—in front of this survey here—into this harbor on the east side of Mr. Alexander's trap and in front of the east end of sur-

(Testimony of James T. Barron.)

vey No. 804. Please answer the question when I get it.

Mr. WINN.—Now, wait a minute. I object to the question as indefinite and uncertain, and also for the reasons I have heretofore urged. If the Court please, I think that is the same. Mr. Cheney says, "Come in here." Now, that don't mean anything. If he would say you could come in to a wharf and reach this upland or make any use of it. No question could [225] land supplies there with a boat. The question is absolutely incomprehensible to the witness, I think.

Mr. JENNINGS.—Read the question again. I thought it was very comprehensive, not only; but clear enough for the record, if the Court please. Just read it again, Mr. Robertson, and let us see what it is.

Q. (Read by the Reporter.) I ask you now if there is anything to obstruct the "Anna Barron's" coming in to—in front of this survey here—into this harbor on the east side of Mr. Alexander's trap and in front of the east end of survey No. 804?

Mr. WINN.—Simply says—

Mr. JENNINGS.—Says come into this harbor on the east side of Mr. Alexander's trap.

A. Come right up here and up here (indicating). No, sir, without piling up if the tide wasn't swift enough to carry her away.

Q. (By Mr. CHENEY.) You understand the question?

A. I say could come in as far as the trap and tie to the trap stakes so far as that is concerned.

(Testimony of James T. Barron.)

Q. You could run clear through the trap if you wanted to. I didn't ask that question. This is Chatham Straits—all open, navigable water?

A. Yes, sir.

Q. Is there anything to prevent or obstruct the "Anna Barron" from coming into this harbor from an east—southeast direction down Chatham Straits on the east end of the survey, homestead survey?

A. No; I couldn't come there without going in front of the trap; wouldn't have room enough there.

Q. Wouldn't have room enough, Mr. Barron?

A. No. From the clear of the wharf have to have scope there unless get clear out back up to here for anchorage purposes. [226]

Q. What is the reason you couldn't anchor?

A. Well, because the water is too shallow; have to get out from the shore; they wouldn't anchor right close to the shore; want to have 400 or 500, 300 feet from shore anyhow.

Q. If the wind isn't blowing, couldn't she anchor?

A. Well, allow your boats to do it.

Q. Didn't you say the water is deeper over here, Mr. Barron, than it is along here?

A. Yes; but not over here so deep; right out here quite deep; quite possible if she comes this way she could.

Q. (By Mr. WINN.) Now, by that, where do you mean, Mr. Barron?

A. To anchor in front of our property have to come out to get away from that angle of the trap; have to go clear out from shore, so to anchor her and get

(Testimony of James T. Barron.)

scope; so as to turn with the tide; have to have swinging room; have to have your anchor about 100 feet at least; if there was 30 feet of water you would have to have about 150 feet of chain and water; the "Anna Barron" is 100 feet long, so have to have 500 feet of water to swing with safety or you couldn't go near the place—

Q. (By Mr. CHENEY.) The "Anna Barron," we will say, is 100 feet long and the chain 150 feet, that is 250 feet?

A. —and then as the tide changes—

Q. Swings around in a circle? A. Yes.

Q. But from the circumference to the center of the circle be 250 feet? A. Yes.

Q. When you say 500 feet, you mean from one side of the circle to the other? A. Yes.

Q. You don't mean have to lie off this trap 500 feet? [227] A. No; about 300 feet.

Q. 250?

A. Give her plenty of room. Depends entirely upon the depth of the water.

Q. Isn't it a fact, Mr. Barron, that the anchorage is better over here than it is over in here?

A. I don't think it is protected from the north wind.

Q. At this—in front of the east end of the survey isn't the anchorage better than at the west end?

A. I will get to it. No, sir; more protected too.

Q. From the north wind?

A. Yes; from the north wind, and that is the prevailing wind have to buck against in bringing our pil-

(Testimony of James T. Barron.)

ing home. The other winds—

Q. Well, I will ask you this, Mr. Barron, what do you—what do you talk about bringing piles into that harbor—what do you bring piles into that harbor for?

A. In case the north wind blows is a sort of harbor of refuge.

Q. In case of a north wind it is a refuge?

A. Yes; because they buck it.

Q. In case the north wind blows or in case of any other wind the harbor down at Hawk Inlet is better?

A. You pass the harbor there.

Q. How far is it from Hawk Inlet harbor to this little place?

A. Oh, I should judge six or seven miles.

Q. And Hawk Inlet, you said, was a good harbor?

A. It is with—certainly it is a good harbor. It is an inlet.

Q. It is a big harbor?

A. Yes; but you have to go in quite a little ways there and swing around, if it is late.

Q. Well, the "State of California" goes in there, doesn't it? [228]

A. Yes; but more out of your way. Have to go up the inlet.

Q. On the road to Funter Bay from Fresh Water Bay?

A. You go along that shore—the wind isn't so bad along the shore—takes quite a tremendous storm to prevent a boat towing logs up to this place.

Q. Then, Mr. Barron, if that wind is protected along that shore, what occasion have you to go in that harbor, this little cove?

(Testimony of James T. Barron.)

A. It is a natural cove there to anchor.

Q. If you have occasion to go in any harbor the Hawk Inlet harbor would be better than this place?

A. No; it is farther from the cannery.

Q. It is farther from the cannery?

A. Why, it is closer.

Q. You said only five or six miles.

A. Well, five or six miles towing of logs means an hour.

Q. Well, you are bringing these tows of logs clear across Chatham Straits from Chicagoff Island, aren't you?

A. Don't have to do that if the north wind isn't blowing.

Q. Don't have to do what?

A. If the north wind isn't blowing.

Q. If the north wind isn't blowing you come right up the Straits? A. Yes.

Q. Don't go in there at all? A. No.

Q. As a matter of fact, how many times do you suppose your "Anna Barron" or "Kodat" has been in there with a big tow of piles this last year?

A. Yes.

Q. Do you know they have been in there at all?

A. Yes.

Q. The last couple of years? A. Yes. [229]

Q. When were they in there with a tow of piles?

A. Why, I can't remember. I think so; I am pretty sure; the captain has told me of one occasion. I don't put those down or make a note of it.

Q. You never heard Captain Crockett or any other

(Testimony of James T. Barron.)

captain say that was a good harbor?

A. Oh, say a little harbor for the north wind.

Q. Never heard them say that? A. Oh, yes.

Q. But you never heard them make the statement, Mr. Barron, that was a good harbor?

A. Oh, I am satisfied I have. Of course, I can't recall the conversation but I know instances when he has been in there and I suppose he told me about. Wouldn't have gone in there unless it was.

Q. You are not prepared to state to the Court now when it was that any of your boats went into this little harbor with a tow of logs in the last two years?

A. Well, I am pretty sure Captain Mason has. Of course, last year we couldn't go in there because the trap was there and he couldn't get in.

Q. How many times do in the year before?

A. I don't know. I don't remember. I am not running the boat. I can't attempt to testify to that.

Q. No; but you have testified on direct examination that sometimes you used this as a harbor for your boats coming from Fresh Water Bay?

A. Yes, we have more than once, but how many times or what particular time it was, of course, I can't state.

Q. Now, Mr. Barron, when did you first know that Mr. Alexander was driving his trap out there or was going to? [230]

A. When I had a telegram or cable from—

Q. Mr. Barker? A. —from Mr. Barker.

Q. When was the date of that, do you know?

A. Some place in March. 13th, 14th or 15th of

(Testimony of James T. Barron.)

March, I think. I don't remember.

Q. Before that, wasn't it?

A. Well, I have not the dates with me. I don't know.

Q. You got a letter from Mr. Alexander there telling you about what he was going to do?

A. That was after Mr. Barker had seen him and notified him it was my location.

Mr. WINN.—That letter is here. He had a telegram from Barker on the 15th of March.

Mr. CHENEY.—I am not talking about letters, I am talking about cablegrams.

Q. You got a cablegram from Mr. Barker before that?

A. Yes; and the letter that Mr. Alexander wrote was after he was notified it was my location.

Q. But I am asking you when you got this telegram from Mr. Barker. Wasn't it about the 7th of March?

A. Well, whenever—whatever time it was when he notified Mr. Alexander that he was driving on our location and I had the upland.

Mr. WINN.—Don't you know those telegrams are on file here, Mr. Cheney?

Mr. CHENEY.—I know what telegrams I am talking about, Judge. I am not talking about those.

Q. You got a telegram from Mr. Barker about the first part of March—the 7th or 8th of March, didn't you?

A. I don't know really, Mr. Cheney, because I haven't kept those on my mind. I suppose that can

(Testimony of James T. Barron.)

be ascertained. I suppose [231] I can get the telegram in my records, but I don't know exactly when it was I received it. The first intimation I had was that Mr. Barker claimed that Mr. Alexander had started there to drive the location.

Q. And right after that you bought this from Mr. Robertson?

A. No, I beg your pardon. I had this long before. I had this paid for before the 8th of March. I thought it was the 1st of March.

Q. The deed is dated the 8th of March?

A. Before I had any intimation from Mr. Barker of Mr. Alexander's going there. I do remember it came like a thunder-bolt that we had been and he consulted me at once.

Q. You are sure you didn't know about Mr. Alexander's driving a trap before you bought this homestead property?

A. No; I told Mr. Barker I had secured the upland, not being in any hurry about doing anything as I had waited an entire year and for that reason he had no direct orders from me what to do.

Q. How many trap locations are you holding, Mr. Baron?

A. Well, I have driven a large number of locations. I have twelve.

Q. And how many do you claim you haven't driven?

A. Well, I have driven everything but two little locations, except I am driving that.

Q. Everything you claim is driven too?

(Testimony of James T. Barron.)

A. Yes; twelve and this location.

Q. I say every trap location you claim is driven now except two?

A. Oh, no; there was one I tried to drive last year and couldn't make it stick, and that has never been finished. Couldn't finish it.

Q. Yes.

A. But, of course, have one or two piles up simply to flank our trap, but never intended to drive and in fact couldn't drive [232] a trap.

Q. You haven't tried to hold them with piles?

A. I have never put a single pile excepting last fall when we expected to get two little traps that I wanted to protect my other trap—I have confined myself right to my own district; never attempted to go outside the district.

Q. How many homestead locations have you on the upland above your traps?

Mr. WINN.—Object—incompetent, irrelevant and immaterial.

COURT.—I don't see that is material, Mr. Cheney.

Mr. CHENEY.—Well, it wouldn't be material probably, but counsel has said so much about the good faith of the plaintiff in this case in his argument.

WITNESS.—Good faith; I never had anything but good faith in my life.

COURT.—The good faith of the plaintiff, Mr. Cheney, will have to be determined by his actions in relation to this particular trap in controversy.

Mr. CHENEY.—Yes, but counsel stated in his

(Testimony of James T. Barron.)

opening of this case that he didn't think the intention of Mr. Barron as to what he is going to do with this land or what he is doing with the fish business, and so forth, had anything to do with this case. That is his statement to the Court, and now he attempts to introduce in evidence as to what Mr. Barron and the Thlinket Packing Company are doing with this upland.

COURT.—Yes, with this particular trap, but he hasn't asked him what he intended to do with any other than the particular trap.

Mr. CHENEY.—No; that is true.

COURT.—No. I think we ought to confine our examination in this to that. [233]

Mr. CHENEY.—Might be material to know what his intention was in getting this upland.

Mr. WINN.—That is for the Land Office.

Mr. CHENEY.—I don't think myself his intention or what he is going to do with this land has anything to do with it.

COURT.—I have excluded any testimony as to what Mr. Barron intends to do with this particular tract. The testimony then to it is excluded—his testimony concerning any other tract. Any further cross-examination, gentlemen?

Mr. CHENEY.—Just a moment, if your Honor please. I believe that is all.

Mr. JENNINGS.—I want to ask him some questions. I know it is a little irregular, if the Court please.

Mr. WINN.—No objection.

(Testimony of James T. Barron.)

Mr. JENNINGS.—Trying the case on the merits.

COURT.—All right.

Q. (By Mr. JENNINGS.) Now, Mr. Barron, you say that it would to put that fish-trap there would interfere with safe anchorage—the safety of anchorage of vessels going in there, particularly the "Anna Barron," and that constitutes a menace to navigation. Is that your statement?

A. At the present time with the present trap; yes.

Q. That vessels can't go in there out of storms—out of a storm? A. Not, with the—

Q. No place to run in to?

A. Not with the piling like we have to tow, that is why we go in there for.

Q. Yes. Couldn't get in there. Neither the "Anna Barron," nor vessels that you tow, or any other vessels; no vessel could get in there? [234]

A. Not with a tow; no.

Q. Now, that is your principal objection to this trap, isn't it?

A. Well, I have got the upland. I don't want it turned off.

Q. That is your principal objection to this trap, isn't it?

A. Well, I can't understand your question.

Q. What?

COURT.—He says he can't understand your question.

WITNESS.—I can't understand.

COURT.—The question is—counsel asks you if that is your principal objection to the trap.